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The Madras Law Journal Reports.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

aji Kasim Saiba ... ... Applt. (*Counter-petr.*)*

v.

urni Deog Luis ... ... Respondent (*Petitioner*).

Civil Procedure Code, S. 583—Restitution.

Where the mortgagee from one of two rival claimants to a Mutt brought a suit r the recovery of rent against a tenant of some Mutt lands to which the other aimant was made a party-defendant and the tenant paid the money into court to e given away to the person found entitled and the plaintiff obtained the money in msequence of a decision in his favor by the Appellate Court which however was versed on second appeal preferred by the rival claimant making the tenant and the aintiff respondents :

Held, in an application by the tenant for restitution of the money paid over to e plaintiff, by *Best, J.*, that the tenant was not entitled to restitution as there s no decree in his favor but only in favor of the rival claimant: by *Muthusami yar, J.*, that the payment by the tenant into court having been in favor of the right-l claimant, an erroneous order of the court directing payment to the wrong party n only be rectified at the instance of the person rightfully claiming it.

Appeal against the order of the District Judge of South Canara ted 28th January 1892 passed on Civil Miscellaneous Appeal o. 51 of 1891, confirming the order of the District Munsif of lipi passed on Execution Petition No. 493 of 1891.

The facts of this case are sufficiently set out in the following dgment of *Best, J.*

K. Naraina Row for appellant.

R. Runga Row for *C. Ramachandra Row Saheb* for respondent.

JUDGMENTS :—*Best, J*:—This is an appeal against an order of the District Judge directing the appellant, who was plaintiff in the suit, to refund to the respondent, who was the 1st defendant, money paid by the latter on account of rent admittedly due on the land of which respondent was tenant. The land belongs to the

* C. M. S. A. No. 36 of 1892. 17th October 1893.

Puthige Mutt at Udipi, and had been mortgaged to appellant Sumatindra Swami as trustee of the Mutt. The validity of Sumtindra's appointment to the trusteeship was under litigation at the time of the mortgage, and was eventually decided against him. The rent in question was claimed also by Sudindra Swami, who was eventually declared the rightful trustee. He was consequently included as 2nd defendant in the suit. The money was deposited in court by the respondent with the request that it might be paid whichever of the claimants might be found entitled to it. The Court of First Instance dismissed the plaintiff's *i. e.,* appellant suit but on appeal that decision was reversed, and thereupon the money was paid to appellant. But in second appeal preferred by Sudindra Swami, the 2nd defendant in the suit, this court reversed the decree of the Lower Appellate Court and restored that of the District Munsif. Hence the application out of which the present appeal has arisen, for restitution to 1st defendant of the money wrongly paid to plaintiff. The District Court has upheld the order of the District Munsif in favor of the respondent, and from that order this second appeal is preferred by the plaintiff.

It is contended on behalf of appellant that respondent is not entitled to restitution under S. 583 of the Code of Civil Procedure as there is no decree in his favor, he not having been an appellant but merely a respondent (jointly with the present appellant) in the Second Appeal No. 657 of 1889, in which was passed this court's decree dismissing the present appellant's suit; whereas the appeal (Second Appeal No. 778 of 1889) preferred by this respondent from the same decree (which appeal was dismissed) related only to interest and costs.

The contention on behalf of appellant is that the respondent "was not declared entitled to any benefit under any decree so as to claim restitution." I do not understand this contention to mean that restitution can only be made under S. 583 of the Code in cases in which it is expressly directed by the decree; such a contention would clearly be barred: *Cf. Balvantrav Oze* v. *Sadrudin,* I. L. R, 13 B, 435. I understand the contention on behalf of appellant to be that respondent is not entitled to the restitution sought, as there is *no decree whatever in his favor.* This contention is, I think, valid. The decree in Second Appeal No. 657

of 1889 was a decree in favor of the 2nd defendant in that suit; and if as the result of that decree it happens that the money was wrongly paid to the present appellant, it is for that 2nd defendant to ask the court to get it back and pay it to himself as the party entitled to the same, it having been paid into court by this respondent for payment to whichever of the two claimants before it in the same suit might be found entitled to the same.

Respondent having paid the money into court in a suit to which both the claimants were parties, is fully discharged from all liability; and in the absence of a decree in his favor, he is entitled to no refund from the appellant. I would therefore allow the appeal and, setting aside the order of both the courts below, dismiss respondent's application with costs throughout.

Muthusami Aiyar, J :—I agree. The payment was not made into court under Chapter XXIII of the Code of Civil Procedure, for such payment presupposes an admission of the plaintiff's claim to the extent of the payment. In the present case the payment was made with the request that the money should be paid out to the party really entitled to the rent. It is a payment made under the impression that the suit though brought by the plaintiff might be treated as being in the nature of an interpleader proceeding under S. 490, Civil Procedure Code. The Munsif was wrong in ordering the money to be paid out to the plaintiff without security before the decision of the second appeal, and the party entitled to put him in motion in order to rectify this error and to call for a refund is the 2nd defendant. The 1st defendant is therefore not entitled to ask for a refund and I concur in the order proposed by my learned colleague.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, Kt. Chief Justice and Mr. Justice Shephard.

Chathoth Parkum Kuttempeth Chalapreth Komappan Nambiar and others. } Applts. (*Plffs*).*

v.

Kuttempeth Ukkaran Nambiar and others. Respdts. (*Defts*).

* S A. No. 1548 of 1892. 5th September 1893.

Komappan Nambiar v. Ukkaran Nambiar.

Civil Procedure Code, S. 13—Karnavan and senior anandravan not sued in a representative character—Subsequent suit by other members.

The decision in a suit by the karnavan of a tarwad against the karnavan and senior anandravan of a branch tarwad not impleaded in a representative character cannot have the force of *res judicata* in a suit instituted by the junior members of the branch tarwad against the plaintiff in the former suit in respect of the same property.

Second Appeal against the decree of the District Judge of North Malabar in Appeal Suit No. 227 of 1892, reversing the decree of the District Munsif of Payoli in Original Suit No. 13 of 1892.

The facts of this case appear sufficiently from the following judgment of the High Court.

P. R. Sundara Aiyar for *K. P. Sankara Menon* for appellants.

K. Naraina Row for *C. Sankaran Nair* for respondents 2 to 6.

JUDGMENT:—The present suit is brought by twelve persons alleged to belong with Chathu Nambiar, the 12th defendant, to a branch tarwad. They claim a property held under lease by the 13th defendant. In 1887 the 1st defendant in the suit, who is karnavan of the tarwad, brought a suit to recover the same property. In that suit the tenant was joined as 1st defendant and the other two defendants were the above-mentioned Chathu Nambiar and another member of the branch, Raman Nambiar. The main contention in that suit was that these two, Chathu and Raman, belonged to a branch having no community of interest with the main tarwad. That contention was overruled and a decree was passed in favor of the then plaintiff, the karnavan. This decree, it has been held by the District Judge, is binding on the present plaintiffs because in the former suit they were represented by Chathu and Raman, respectively, the karnavan and senior anandravan of their branch. The District Judge held that the question sought to be raised in the present suit is *res judicata*. In our opinion the judgment cannot be sustained. In the first place, the statement that the two members, Chathu and Raman, represented any body but themselves seems to be a mere assumption. The only part of the record in the previous suit which is produced is the judgment, and from that it would be difficult to say that the then defendants were impleaded by the then plaintiff or put themselves forward in a representative character. At any rate, the mere fact that they are branch karnavan and senior anandravan is no ground for raising

any inference. It must be remembered that the case for the then plaintiff was that there is no such thing as an independent branch existent and Chathu was joined as a defendant because he happened to have taken a part in granting the demise.

Under these circumstances we are of opinion that there really is no foundation for the statement of the judge on which he rests his conclusion as to the applicability of S. 30 of the Civil Procedure Code. In drawing that conclusion also, the judge is clearly in error. It has been more than once decided that although the members of a tarwad or family may in an irregular fashion be represented by a karnavan of the tarwad, the decree does not raise an absolute estoppel against members not actually brought on the record, see *Ittiachan* v. *Velappan*, I. L. R, 8 M, 488, *Sri Devi* v. *Kelu Eradi*, I. L. R, 10 M, 79, and Second Appeal No. 93 of 1885.

We must therefore reverse the decree of the District Judge and remand the appeal for disposal. The plaintiffs are entitled to the costs of the appeals. For other costs provision will be made in the revised decree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Muthusami Aiyar.

Sri Raja Sobhanadri Appa Row Bahadur Zamindar Garu, minor by next friend P. Lakshminarayana, Manager on behalf of the Court of Wards. } Petitioner (*Plaintiff*).*

v.

Elamanchili Chalamanna ... ... Respondent (*Defendant*).

Sobhanadri Appa Row *v.* Chalamanna.

Limitation Act XV of 1877, Sch. II, Art. 110—Suit for rent—Arrears due from date of judgment amending patta.

The landlord tendered a patta within the fasli to which the patta related but the tenant refused to accept it. He then brought a summrry suit to enforce acceptance of patta which was finally decided by the District Judge on appeal amending the patta and directing its acceptance. In a suit for rent due for the fasli, instituted by the landlord, the defendant pleaded limitation, more than three years having elapsed from the end of the fasli :

Held, that the suit was not barred as the arrears became due, under Art. 110, Schedule II of the Limitation Act, only on the date of the judgment of the District Judge amending the patta and not at the end of the fasli.

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* C. R. P. No. 42 of 1892. 12th September 1893.

Petition under Section 25 of Act IX of 1887 praying the High Court to revise the decrees of the District Munsif of Bezwada in Small Cause Suit No. 502 of 1891.

The facts of this case appear sufficiently from the following judgment of the High Court.

P. R. Sundara Aiyar for *P. A. D'Rozario* for petitioner.

The respondent was not represented.

JUDGMENT :—The plaintiff is a minor Zamindar under the care of the Court of Wards and the defendant is his tenant. The present suit was brought on the small cause side of the District Munsif's Court of Bezwada to recover the balance of sist due for Fasli 1296. It was admitted by both parties that according to kistbandi, rent was payable every year in instalments from October to March of each fasli. The plaintiff's father tendered patta for fasli 1296 but the defendant refused to accept it. Thereupon the plaintiff's father instituted a suit in the Revenue Court to enforce acceptance of the patta and the parties joined issue on the question whether the patta tendered was proper or such as the tenant was bound to accept. It was only in May 1888 that the summary suit instituted in 1886 before the Head Assistant Collector was dealt with by the District Judge on appeal. He held that the patta tendered was not a proper one and passed a decree under S. 10 of Act VIII of 1865. In accordance with the provisions of that section, he declared the terms of the patta which ought to be offered and passed a judgment ordering the defendant to execute a muchilka in accordance with it. The plaintiff then brought this suit to recover the difference between the rent due according to the patta as amended by the decree and the payments made on account of rent by the defendant previous to the decree. The defendant resisted the claim and pleaded, *inter alia,* that it was barred by limitation. The District Munsif upheld the defendant's contention and dismissed the suit with costs. It is argued in revision that the suit was not barred by limitation and in support of the contention reliance is placed on the decisions in *Court of Wards* v. *Darmalinga,* I. L. R, 8 M, 2, *Kullayappa* v. *Lakshmipathi,* I. L. R, 12 M, 467, and *Appayasami* v. *Subba,* I. L. R, 13 M, 463.

As observed by the District Munsif, the petitioner is not entitled to any deduction of time under Ss. 14 and 15 of the Act of Limitations. The cases contemplated by those sections are those in which a former suit failed from defect of jurisdiction or other cause of a like nature or the former suit was stayed by injunction or order. In the case before me, the summary suit did not fail but was adjudicated upon. Nor was the cause of action or the relief claimed in the former suit same as in the present suit. The District Munsif is also right in holding that the suit to recover arrears of rent is governed by Art. 110 of the Act of Limitations which prescribes three years from the time when the arrears become due. The substantial question, therefore, is when did the arrears become due and whether it was from the date when they should be paid according to the kistbandi or from the date on which the plaintiff was in a position to sue for rent.

In *Court of Wards* v. *Darmalinga,* I. L. R, 8 M, 2 it was held that the landholder is not bound to tender a patta for acceptance as amended by the decree before suing to enforce the terms thereof and no question of limitation arose in that suit. The point determined in *Kullayappa* v. *Lakshmipathi,* I. L. R, 12 M, 467 was that a landlord could not attach the saleable interest of a defaulting tenant under S. 38 of Act VIII of 1865 until the expiry of the current revenue year. The decision in *Appayasami* v. *Subba,* I. L. R, 13 M, 463 is only an authority for the proposition that the unit for the special rule of limitation prescribed by the Rent Recovery Act, S. 2, for proceedings by the landlord was the aggregate rent in arrears at the end of the fasli. This is not a suit falling under S. 2 of Act VIII of 1865 and none of the cases cited appears to me to be in point.

The real question, as already observed, is when did the arrears of rent claimed by petitioner become due. By S. 7 no suit can be sustained to recover rent until a patta is tendered and accepted or a proper patta is tendered and the tender of a proper patta is a condition precedent to the contract between the parties becoming actionable. It is a contradiction in terms to say that rent is due before the landlord is in a position to sue. When the landlord may sue for rent must depend on the terms of the contract in each case and when the legislature renders any contract actionable only on

the occurrence of a particular event, no obligation can arise till that event occurs. By S. 10, the amended patta relates back to the state of the suit brought to the enforcement of acceptance of the patta. In cases in which landlord sues in time to enforce the acceptance of a patta, the landlord is not in a position to sue for rent until the decree passed under S. 10 either amends the patta or declares it to be a proper patta. Otherwise a suit to enforce the acceptance of a proper patta may be pending in a Revenue Court for several years and the claim for rent may be barred before landlord acquires a right of action.

I am therefore of opinion that this suit is not barred. I set aside the decree of the District Munsif and remand the case for disposal on the merits. The costs hitherto incurred will abide and follow the result and be provided for in the revised judgment.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Samia Pillai ... Appellant (2nd *Deft*).*

v.

Chockalinga Chettiar and another ... Respondents (*Plffs*).

Samia Pillai *v.* Chockalinga Chettiar.

Limitation Act XV of 1877, Sch II, Art. 179—Application against deceased judgment-debtor in accordance with law.

Held, an application for execution which by mistake specified the name of one of many joint judgment-debtors who was dead at the time of the application, as the person against whom execution was sought, was an application in accordance with law within the meaning of Art. 179 of Sch. II of the Limitation Act.

Appeal against the order of the Subordinate Judge of Negapatam, dated 6th February, passed on Civil Miscellaneous Petition No. 628 of 1891 in Original Suit No. 30 of 1883 on the file of the Subordinate Judge of Kumbakonam.

The facts of this case are sufficiently stated in the following judgment of the High Court.

M. O. Parthasaradhi Aiyangar for appellant.

T. Rama Row for respondents.

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* C. M. A. No. 84 of 1892. 18th October 1893.

JUDGMENT:—The question for decision in this case is whether the last application for execution made on the 6th February 1891 was in accordance with law within the meaning of Art. 179 of Schedule II of the Limitation Act so as to amount to a step in aid of execution sufficient to prevent the present application being time barred.

That the application was presented by the party entitled to execute the decree and in order to obtain execution is not denied, but it is contended that as 1st defendant who was dead at the time was named as the party against whom execution was sought, the application must be treated as a nullity and consequently the present application held to be time barred.

The Subordinate Judge observes that the mention of the deceased first defendant's name in column 9 of the application was, probably, a mistake, made by the Vakil's gumastah. It was no doubt a *bona fide* mistake. Where there has been in fact an application for execution made by the party entitled to make it, the mere fact of a mistake having been made in giving the particulars required by S. 235 of the Code of Civil Procedure, cannot, we think, have the effect of rendering the application a nullity. This is also the view adopted in *Ramanadan* v. *Periatambi*, I. L. R, 6 M, 250 and *Fuzloor Ruhman* v. *Altaf Hossein*, I. L. R, 10 C, 541. In this view the application of 6th February 1891 is sufficient to save limitation both against 1st defendant's legal representatives and also against his joint judgment-debtors.

We dismiss this appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, Kt. Chief Justice and Mr. Justice Shephard.

Ramachandra Aiyar ... ... Appellant (*Plaintiff*).*

v.

Sundaramurthi Mudali and another { Respdts. (*Deft's. representatives*).

* S. A. No. 1534 of 1892. 22nd August 1893.

Ramachandra Aiyar. *v.* Sundaramurthi Mudali.

Specific performance—Minor—Contract by Hindu father—Specific Relief Act I of 1877, Ss. 21 (e), 28 (a)—Principle of mutuality.

Where a Hindu father contracts to sell family lands for debts which are not immoral and dies pending a suit instituted against him for specific performance of the contract for sale and his minor sons are brought on the record as his representatives:

Held, that the plaintiff is entitled to specific performance against the minor representatives, and that, where a sale by a father would be binding on his minor sons, an agreement to sell would be equally binding and specifically enforceable

Flight v. *Bolland*, 4 Russ., 298 and *Fatima Bibi* v. *Debnauth Shah*, I. L. R, 20 C, 508 distinguished.

Quaere: Whether, having regard to the express provision of the Specific Relief Act, the principle of mutuality is applicable in this country and specific performance is not enforceable against a minor contractor.

Specific performance cannot be refused on the ground of inadequacy of consideration where the inadequacy is not such as to justify an inference of fraud.

Second Appeal against the decree of the District Judge of Chingleput in Appeal Suit No. 206 of 1890, reversing the decree of the District Munsif of Chingleput in Original Suit No. 228 of 1889.

The defendant contracted to sell to plaintiff certain family lands for a sum of Rs. 2,000 and having received Rs. 200 in part payment executed a receipt for the same and put the plaintiff in immediate possession of the land pending the execution of a conveyance. Defendant having subsequently failed to convey the lands, plaintiff instituted the suit for specific performance. Defendant denied the agreement and the execution of the receipt. The District Munsif found the agreement proved and granted a decree for specific performance. Defendant appealed. Pending the appeal he died and his minor sons continued the appeal. The District Judge also found the agreement proved but held that specific performance should not be granted against the defendant's representatives. His judgment on this point was as follows :—

"Ekambara Mudali is dead and is now represented by two minors, and the question arises even if specific performance might have been enforced against Ekambara Mudali, is it desirable now for the court to exercise this 'highly discretionary authority' against the minors. The Full Bench ruling in *Gurusami* v. *Ganapathia*, I. L. R, 5 M, 337 is a case in point. There the High Court interfered in the minor's interest and granted specific performance only

of the father's moiety as being sufficient to meet the necessities of the case. In the present case the father is dead and the minors or their advisers do not consider it for their interest to have the sale specifically enforced. It has been argued that if the agreement could be enforced against the father by reason of the fact that he was selling his pangus to pay off necessary debts so it can be enforced against the minors and a suggestion has been made by the plaintiff's Vakil to remit an issue to the Lower Court as to the necessity for the sale by the father. I do not think it necessary to do this. The minors do not dispute liability for their debts and when pressed to pay them, they will no doubt do so to the best advantage, but it does not appear that sale of the pangus to the plaintiff is for their advantage. And here it may be pointed out that it has been argued for debts that the consideration Rs. 2,000 is grossly inadequate and hence under S. 28, Act I of 1877, specific relief cannot be enforced. Also S. 22, Act I of 1877, it is pointed out, gives the court a discretion not to decree specific performance where the plaintiff would gain an unfair advantage over the defendant. There is evidence on the record tending to show that the pangus are worth considerably more than Rs. 2,000 and it would, I think, be taking an unfair advantage of the minor defendants to decree specific performance under the circumstances."

He reversed the decree of the first court and dismissed the suit for specific performance decreeing the return of 200 Rs. paid by plaintiff with interest.

The plaintiff appealed to the High Court.

V. Bhashyam Aiyangar and *P. R. Sundara Aiyar* for appellant.

The Advocate-General (*J. H. Spring Branson*), *S. Subramaniem*, and *T. Venkatasubba Aiyar* for respondents.

JUDGMENT :—It being found as a fact that a contract to sell was made by the defendant Ekambara, now dead, and the appellant, the only question is whether there is anything in the circumstances of the case rendering it inequitable that specific performance of that contract should be decreed. It is not easy to understand from the judgment of the District Judge on what precise ground he has thought fit to refuse the prayer of the plaint. His judgment does not proceed on the ground of law declared in

S. 28 (a) of the Specific Relief Act, because though he observes that the property is worth considerably more than Rs. 2,000 he does not find that the price was so grossly inadequate as to justify an inference of fraud having been practised.

Again he refers to the case in *Gurusami* v. *Ganapathia,* I. L. R, 5 M, 337 as an authority, but he does not follow it, for apparently his decree is intended to dismiss the suit altogether and not even to give effect to the contract so far as regards the share of Ekambara. It was contended on behalf of the defendants who being Ekambara's sons were brought on the record after his death, that inasmuch as they are minors the contract cannot be enforced against them, and *Flight* v. *Bolland,* 4 Russ., 298 followed in *Fatima Bibi* v. *Debnauth Shah,* I. L. R, 20 C, 508 was cited. These two cases are distinguishable from the present in a material point, for in them the contract was made by a minor whereas here both parties to the contract were of age and it is as representatives that the minors are brought on the record. It is unnecessary for us to say whether having regard to the express provision of the Specific Relief Act the principle of mutuality is one which ought to be recognized here.

It is argued however that the defendants though in form only representatives of their deceased father, are themselves also interested in the property independently of their father. That is true but the circumstance does not make the case similar to *Flight* v. *Bolland.* On its appearing that the party to a contract against whom specific performance is sought is a trustee or otherwise has not unlimited powers of disposition it is incumbent on the court to see that no decree is made against him which would involve a breach of trust on his part or compel him to do what he is not legally competent to do. And so in the case cited, it was held that as there was no necessity for any sale of the son's interest, the contract could be enforced only to the extent of the father's interest in the property. Here, however, no such difficulty arises. It is admitted that there were debts, and it is not suggested that they were immoral. It was competent to Ekambara to sell the family property to liquidate his debts and as a sale by him of the property comprised in the contract would have been valid to pass the son's interest we cannot see why specific performance of the contract

for sale should not be decreed. The contract no less than the conveyance was within the power of Ekambara and was not made in breach of trust. We must reverse the decree of the District Judge and decree that on payment into court by the plaintiff within two months from this day, of the sum of Rs. 1,800, the defendants execute to the plaintiff a conveyance.

The respondents must pay appellant's costs, throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Muthusami Aiyar.

Rajabadar Naidu and others ... Applts. (*Counter-Petrs*).*

v.

A. Chandrappa Naidu ... ... Respondent (*Petr.*)

Rajabadar Naidu *v.* Chandrappa Naidu.

Civil Procedure Code, S. 266—Future melvaram—Inalienable shrotriem—Pensions Act XXIII of 1871, Ss. 4, 11.

Future melvaram rents of an inalienable shrotriem Inam cannot be attached under S 266 of the Civil Procedure Code in execution of a decree against the shrotriemdar, nor can a receiver be appointed to collect such rents for the discharge of the decree.

Appeal against the order of the District Judge of Chingleput dated 4th March 1892 passed on Execution Petition No. 96 of 1891 in the matter of Original Suit No. 9 of 1881.

The respondent in execution of a decree against the appellants applied for the attachment of their right to recover future melvaram rents from the tenants of an inalienable shrotriem village belonging to them, and the appointment of a reciever to collect them and apply them in satisfaction of the decree debt, The appellants objected to the application on the grounds that the shrotriem being inalienable and unenfranchised the right to the melvaram could not be attached under Ss. 4, 11 of the Pensions Act and that the application related to the rents accrued due they could not in any case be attached under the provisions of S. 266 of the Civil Procedure Code. The District Judge held that the application was not open to any objection under S. 266 and granted it. Hence this appeal by the appellants.

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* C. M. A. No. 88 of 1892. 14th November 1893.

S. Subramaniem and *P. R. Sundara Aiyar* for appellants.

C. Ramachandra Row Saheb for respondent.

The following cases were referred to in argument: *Webb* v. *Stenton,* 11 Q. B. D, 518; *Dent* v. *Dent,* 1 P. & M, 366; *Hall* v. *Pritchet,* L. R, 3 Q. B, 215.

JUDGMENT.—It is provided by Regulation IV of 1831 as modified by Act XXIII of 1838 that the grants referred to in S. 11 of the former enactment shall not be liable to attachment in satisfaction of any decree or order of court. The two villages of which the melvaram right appellant seeks to attach were granted as shrotriem villages and they have not been enfranchised. The order made by the judge is at variance with Regulation IV of 1831 so far as it sanctions the attachment of melvaram which had not accrued due at the date of the application for execution. The principale on which C. M. A. No. 102 of 1889 was decided is also applicable to this case and under S. 266 of the Code of Civil Procedure, it is only the saleable property of the judgment-debtor that is liable to be attached. It is unnecessary for the purpose of the appeal to determine, whether future rents might be attached in execution of a decree if the villages were not inalienable. So far as the melvaram produce which had accrued due to the judgment-debtor is concerned, its liability to attachment is not disputed. I set aside the order of the District Court in so far as it relates to melvaram produce which had not accrued due at the date of the application for attachment and appointment of receiver and otherwise confirm it.

Each party is to bear his costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, Kt. Chief Justice and Mr. Justice Shephard.

Mullolindavida Illikka Pakrammar and others. } Applts. (1st and 3rd to 13th *Plffs*).*

v.

Vendavamprath Kutti Kunhamad and others. } Respdts. (1st and 3rd to 9th *Defts*).

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* S. A. No. 1586 of 1892. 15th September 1893.

Practice—Fresh issue—Custom—Moplas in North Malabar—Marumakkathayam law—Self-acquired property.

Illikka Pakrammar v. Kutti Kunhamad.

Where the parties to a suit have gone to trial upon a specific case, an appellate court is not at liberty to raise a new issue upon a question of mixed law and fact not suggested in the pleadings.

Held, in second appeal, that the evidence in the case did not justify the inference of a custom among Marumakkathayam Mopla families in North Malabar according to which devolution of self-acquired property was said to be governed by the ordinary Mahomedan law.

Second Appeal against the decree of the District Judge of North Malabar in Appeal Suit No. 359 of 1891, confirming the decree of the District Munsif of Tellicherry in Original Suit No. 329 of 1890.

The facts appear from the following judgment.

V. Ryru Nambiar for appellants.

C. Sankaran Nair for respondents Nos. 2 to 5.

JUDGMENT:—The suit is brought by the karnavan of a tarwad alleged by him to follow Marumakkathayam law to recover property acquired by the plaintiff's late sister, Mamotti. The defendants, who include the children of Mamotti, raise, among other defences, two pleas either of which is a complete answer to the plaintiff's claim. They say that Mamotti did not follow Marumakkathayam law and that it was not to her only, but to her and her children that the property sought to be recovered was given. On the latter plea the defendants succeeded on the trial of the suit by the District Munsif though he also found that the family was governed by the Marumakkathayam law. There was, as he observed, no evidence to the contrary. Against the District Munsif's decree dismissing the suit, the plaintiff appealed and he was successful in obtaining a reversal of the finding as to the title of Mamotti. The District Judge found on the 1st issue in the plaintiff's favor, and that finding we are bound to accept. Instead, however, of proceeding to consider the other issue and expressing his agreement or disagreement with the District Munsif thereon, the District Judge—whether on his own motion or at the instance of the defendants does not appear—framed a new issue and directed the District Munsif to take fresh evidence and return a finding thereon. The issue so framed was as follows:—Whether in Marumakkathayam Mopla families in North Malabar, the devolution of

self-acquired property is governed by ordinary Mahomedan law or whether on the death of the acquirer it lapses to the tarwad.

If this issue had been one of mere fact, the procedure of the District Judge might not have been open to exception: it would have been a question whether the issue was raised by the pleadings and whether the District Judge had exercised a wise discretion in giving an opening for a fresh inquiry—certainly his reasons for allowing a new case to be set up are not satisfactory. But the issue raised by the District Judge was not a mere issue of fact. It was not even a question as to the custom prevailing in a particular family but, as he himself says, a question as to what is the ordinary customary law in Mopla families. The cases decided in *Vishnu* v. *Krishnan*, I. L. R, 7 M, 3 and *Vayidinada* v. *Appu*, I. L. R, 9 M, 44 are authorities for the proposition that such an inquiry is allowable under certain circumstances. In these cases too, among others, the tests and the standard to which the evidence adduced to support an alleged usage should conform are given. In the present case, however, it does not appear that the judge had before him a particle of evidence (excepting the opinions of two text writers) to justify an inquiry into the law regulating Mopla families. In our opinion, therefore, the order of remand is one which ought to have been passed under S. 566 of the Code and the proceedings taken under it are wholly irregular. Mr. Sankara Nair has referred us to decisions of this court in support of his contention that the conclusion at which the judge has arrived is the right one. In Second Appeal No. 576 of 1883 this same question, *viz.*, as to the descent of self-acquired property in a Mopla family was raised. There was an enquiry and it was found that Moplas are governed in that respect by the ordinary Marumakkathayam law as declared in *Kallati Kunju Menon* v. *Palat Erracha Menon*, 2 M. H. C. R, 162. That finding was accepted by the High Court. In 1886 (Appeal No. 125 of 1885) the question was raised again, an enquiry was again directed and the finding was this time in favor of the deviation from Marumakkathayam law. The High Court accepted that finding so far as it concerned the particular family, holding that there was, as regards it, sufficient evidence of a special custom. As far as we are aware, the question has not been raised since in this court, although there have been cases in which the contention now made would be relevant. In the case reported at

I. L. R, 16 M, 201, *Kunhacha Umma* v. *Kutti Mammi Hajee,* the question referred to a Full Bench was as to the nature of the interest taken by a Mopla woman and her children in a gift made to them. If, by the ordinary law of inheritance, the children and not the tarwad generally, would succeed to the mother, the probability is that the gift would be made simply to her,—but however that may be, the fact that such was the rule would have been strong to indicate that the tarwad took no interest under the gift. The evidence taken in the present case, so far as it is discussed in the judgments, certainly does not convince us of the existence of the alleged custom. The District Munsif gives good reason for holding it to be vague and uncertain, and the District Judge overruling that finding does not explain how evidence almost exclusively composed of recent documents can suffice to prove an ancient custom; nor indeed does he profess to hold that it is of a character to prove a custom in the manner required by a series of decided cases. Being of opinion that the order of remand was improperly made and seeing that both the defences set up by the defendants have failed, we must hold that the plaintiff is entitled to judgment. We must accordingly reverse the decrees of the courts below and remand the case to the Court of First Instance for trial on the 7th issue.

Respondents to pay costs of this appeal: other costs to be provided for in the revised decree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Narainasami Naidu ... ... Appellant (3rd *Deft*).*

v.

Naraina Row Gaikkavadi .. .. Respondent (*Plaintiff*).

Narainasami Naidu v. Naraina Row.

Mortgage—Rights of first and second mortgagees—Redemption—Sale—Interest—Penalty.

Where property is purchased by a prior mortgagee in execution of a decree upon his prior mortgage, a subsequent mortgagee has not merely a right to redeem the prior mortgagee but can also bring a suit against him for sale of the mortgaged property.

A provision for payment of an enhanced rate of interest from the date of the bond on default of payment on the due date is binding on the parties in the absence of surprise, undue advantage, and other similar circumstances.

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* S. A. No. 338 of 1892. 13th September 1893.

Second Appeal against the decree of the Subordinate Judge of Tanjore in Appeal Suit No. 69 of 1891 presented against the decree of the District Munsif of Tirutarapundi in Original Suit No. 219 of 1889.

The facts appear form the following judgments.

V. C. Desikachariar for *V. Bhashyam Aiyangar* and *C. R. Tiruvenkatachariar* for appellant.

S. Subramaniem for respondent.

JUDGMENTS :—*Muthusami Aiyar, J* :—The parties to this appeal are prior and subsequent mortgagees of the land in dispute which is 17 maws and odd in extent. The land in question originally belonged to Saminatha Bosalai and his coparceners. On the 10th March 1881 they sold it together with other property to 1st defendant for Rs. 1,500 (Exh. J). The purchaser mortgaged it and other property to one Vengusami for Rs. 3,000, under Exh. I, dated the 19th March 1881. The mortgagee instituted Original Suit No. 84 of 1882 and obtained a mortgage decree, in execution of which he purchased the 7 velies mortgaged to him (including the land in dispute) and other land, and obtained possession of the same on the 2nd October 1885. On the 20th January 1886 the purchaser at the execution sale sold the lands to appellant's father for Rs. 3,750 by Exh. H. This document recites that out of the purchase-money, *viz.*, Rs. 3,750, Rs. 760 were retained by the purchaser for payment of prior encumbrances. Thus appellant's claim as the purchaser at the court sale in Original Suit No. 84 of 1882 has to be traced to the mortgage executed to Vengusami on the 19th March 1881. The plaintiff respondent's hypothecation bond A was executed by 1st defendant in plaintiff's favor on the 29th August 1881 about five months subsequently to the mortgage in favor of Vengusami. This hypothecation was executed to pay off the debt under the decree in Original Suit No. 185 of 1872 on the file of the Additional Munsif of Tanjore in execution of which the land now in dispute and other lands were under attachment since the 7th June 1881. Thus, respondent's claim is derived from the mortgage of the 29th August 1881. To Original Suit No. 84 of 1882 the plaintiff-respondent was not made a party and he is not, therefore, debarred from enforcing his charge. Upon these facts the Lower Appellate Court held that respondent had a right to redeem the prior mortgage or to bring the mortgaged property to sale and decreed, *inter alia*, that unless appellant paid

the sum due to respondent and redeemed the mortgage in six months the mortgaged property be sold in execution of respondent's claim. For appellant it is contended that there ought to be no decree for sale, and that a puisne encumbrancer's remedy as against a prior encumbrancer is limited to a right to redeem and does not include a right to bring the property to sale. I do not consider this contention to be tenable. That a second mortgagee has a right to redeem a prior mortgage is not disputed, the real question being whether he can also claim a direction that the property be sold so as to throw the burden of redemption on the prior instead of the subsequent mortgagee. He is certainly entitled to say that the mortgage property is sufficient for payment of both debts, that if sold on account of them there will be a surplus after satisfying the prior mortgage and that that surplus should be appropriated in payment of the second mortgage. The only ground on which the prior mortgagee could resist such demand is that the property in question was not sufficient to satisfy both mortgages and that it was exhausted in satisfying the first mortgage which has a priority of claim to payment. Upon the finding that Rs. 760 was reserved out of the purchase-money for payment of prior encumbrances, this defence is not available to the appellant. In *Perumal* v. *Kaveri*, Second Appeal No. 1262 of 1891, I. L. R, 16 M, 121 no portion of the purchase-money was reserved for paying off the prior encumbrances and there was no undertaking to pay the second mortgage as in this case. Moreover, the second transaction in this case was a hypothecation which created a charge on the property and there is no reason why the charge should not be satisfied when a portion of the purchase-money was retained for meeting prior encumbrnces. As regards interest, the Subordinate Judge's decree is in accordance with the decision reported at I. L. R, 11 M, 294, *Basavayya* v. *Subbarazu.*

I would dismiss this appeal with costs.

Best, J:—The finding of the Subordinate Judge is that 3rd and 4th defendants (should be 3rd defendant's father and 4th defendant) undertook to pay plaintiff's debt, "and retained money for that purpose." On this finding there can be no question as to the propriety of the decree which makes the debt a charge on the property mortgaged of which 3rd defendant is now the sole owner.

The case is distinguishable from *Gokuldoss Gopaldoss* v. *Rambux Seochand,* L. R, 11 I. A, 126; because according to the Subordinate Judge's finding the appellant's father when purchasing from Vengusami bound himself to pay off the plaint debt and retained Rs. 760 of the purchase-money for the purpose of paying off the debt. *Cf,* L. R, 11 I. A, at p. 132. For the same reason this case is also distinguishable from Second Appeal No. 1262 of 1891, to which our attention was called by the appellant's Vakil.

As to the contention that Exh. M has been misconstrued by the Subordinate Judge it appears from M, that 3rd defendant's father and 4th defendant then ignored Subbammal's debt and expressly denied the liability of the plaint property for that debt whereas their present plea is that the Rs. 760 were retained for the payment of that very debt.

The only other objection urged on behalf of appellant is as to the interest awarded at 18 per cent. It is objected that this is a penal rate and therefore not enforceable. The bond which is dated 29th August 1881 stipulates for payment of the principal amount on the 30th August 1883 with interest at 12 per cent per annum and provides that in default of payment on the above date, the interest shall be at the enhanced rate of 18 per cent *from the date of the bond.* The question has recently been considered by a Full Bench of the Allahabad High Court in *Banke Behari* v. *Sundar Lal,* I. L. R, 15 A, 232, and the conclusion arrived at is that such stipulations in contracts substituting in a given state of circumstances a higher for a lower rate of interest, cannot be treated as penalties, but must be interpreted—as other parts of a written contract should be interpreted—according to the expressed intention of the parties. To the same effect also is the decision of this court in *Appa Rau* v. *Suryanarayana,* I. L. R, 10 M, 203 where the true principle of decision is stated to be that a court "should not interfere to protect persons who, with their eyes open, choose knowingly to enter into even somewhat extortionate bargains, but that it is only when a person has entered into such a bargain in ignorance of the unfair nature of the transaction, advantage having been taken of youth, ignorance or credulity, that a court of equity is justified in interfering." See also *Basavayya* v. *Subbarazu,* I. L. R, 11 M, 294 and the decision of the Privy Council in *Balkishen Das* v. *Run Bahadur Singh,* I. L. R, 10 C, 305.

As observed by the Privy Council, in *Dimech* v. *Corlett,* 12 Moore's P. C. Cas., at p. 229—"the hinge on which the decision in every particular case turns is the intention of the parties collected from the language they have used." In the present case the language is clear enough and there is no reason for supposing that the executant of the bond when he expressly stated that in default of paying the principal and interest at 15 per cent on the date agreed upon for the payment the interest should be payable "from the date of the bond" at the higher rate of 18 per cent did not understand or intend what he said.

I would therefore uphold the Subordinate Judge's decree in its entirety and dismiss this appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, Kt. Chief Justice and Mr. Justice Shephard.

Kunnigarath Kunhayen Haji ... Appellant (*Plaintiff*).*

v.

Athilan Mayan .. .. Respondent (2nd *Deft*).

Transfer of Property Act IV of 1882, Ss. 108 (*e*), 117—Agricultural lease—Destruction by fire—Lease void.

Kunhayen Haji *v.* Mayan.

Held, that a lease of a coffee garden is not an agricultural lease under S. 117 of the Transfer of Property Act.

Where there was a lease of coffee plants and they were destroyed by fire, the lease became void under S. 108 (*e*) of the Transfer of Property Act.

Second Appeal against the decree of the Subordinate Judge of South Malabar at Calicut in Appeal Suit No. 823 of 1891 reversing the decree of the District Munsif of Vayitri in Original Suit No. 41 of 1891.

Plaintiff, as the assignee of arrears of rent due under a lease executed by the 1st defendant to the 2nd, sued the 2nd defendant for the same. The 2nd defendant pleaded, *inter alia,* that the estate was destroyed by fire before the commencement of the term for which the arrears were claimed and that he was not liable to pay rent. The District Munsif held that the 2nd defendant was bound to pay rent under the karar dated 29th November 1876 to the

* S. A. No. 1624 of 1892. 8th August 1893.

1st defendant and gave the plaintiff a decree. On appeal the Subordinate Judge reversed the Munsif's decision holding that as the coffee plants which were the subject of the lease were destroyed by fire in 1882-3, and the land was overgrown with jungle, the 2nd defendant's contract to pay a share of the janmabhogam rent became void.

The plaintiff preferred this second appeal to the High Court.

C. Sankaran Nair and *V. Ryru Nambiar* for appellant.

K. P. Sankara Menon and *B. Govindan Nambiar* for respondent.

JUDGMENT: —We are clearly of opinion that a lease of a coffee garden is not an agricultural lease within the meaning of S. 117 of the Transfer of Property Act. It is argued that S. 108 does not apply because the money sought to be recovered is not rent and the property was not destroyed. Looking at the plaint and the karar B, we think the relation of lessor and lessee was asserted and in fact existed. It is rent which the plaintiff seeks to recover. It is not disputed that the whole of the plants situated in the part included in the karar was absolutely destroyed and the 2nd defendant in consequence abandoned the garden. If as a matter of fact, the land only had been the subject of the demise it might be doubtful whether S. 108 of the Transfer of Property Act applied. But that is not the case. As far as we can gather from karar B. the lease was of the coffee plants only. We think therefore the Subordinate Judge is right and accordingly dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, Kt. Chief Justice and Mr. Justice Shephard.

Reference under Court Fees Act, S. 5.*

Reference under Court Fees Act, S. 7.

Court Fees Act VII of 1870, S. 7, Cl. (4), (*f*)—Court fee—Memorandum of appeal from decree reserving determination of amount for execution.

Where a decree directed the defendant to pay the plaintiff for certain faslies before suit at 2¼ per cent. on the gross revenue of a Zamindari and reserved the determination of the actual amount for execution *held*, in an appeal by the defendant from this decree that the appeal was capable of being valued and that the appellant should value it under S. 7, Cl. (4), (*f*), of the Court Fees Act.

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* Ref. Case No. 1 of 1894. 31st January 1894.

Case referred under Section 5 of Act VII of 1870, by the Registrar of the High Court of Judicature, Appellate Side, Madras.

The facts necessary for the purposes of this report will appear from the following order of reference by the taxing officer of the High Court, Appellate Side, under S. 5 of the Court Fees Act.

"The question referred is, under 'what provision of the Court Fees Act are court fees leviable on the institution of an appeal against a decree in the following terms. It is decreed that the defendant do pay plaintiff the amount claimed by him under the schedule A for faslies 1296 to 1299 and up to November 1890 for fasli 1300 at 2½ per cent. on the gross revenue (of a Zamindari) and that the question as to that amount be reserved for the execution of the decree.'

"The plaintiff prayed in his plaint for a decree directing the defendants amongst other things to furnish accurate accounts of the gross revenue of the Sivaganga Zamindari under their management as lessees for faslies 1296 to 1300 and to pay him 2½ per cent. on the said gross revenue less payments already made to him and this part of his prayer was granted as stated above. This claim appears to have been valued by the plaintiff at Rs. 32,785, but the amount of the gross revenue was not ascertained at the trial nor the sum still due out of the 2½ per cent. thereon awarded; but both were left to be determined in execution and thus the exact value of the subject matter in dispute in the appeal is not known.

"The appellants (defendants) claim that this circumstance brings the appeal under Art. 17, (vi), Schedule II, of the Court Fees Act which provides a fixed fee of Rupees 10 for the case when it is not possible to estimate at a money value the subject matter in dispute and which is not otherwise provided for by this Act. It has been held by the Bombay High Court that a claim for future mesne profits is not one in respect of which a fee would be payable under S. 7 of the Court Fees Act, as the amount could not have been stated approximately as required by the Code of Civil Procedure, S. 50, Cl. (*f*), *Ramkrishna Bhikaji* v. *Bhimabai*, I. L. R, 15 B, 416; and the same principle has been applied to interest subsequent to the date of decree, *Vithal Hari Athavie* v. *Govind Vasudeo Thesar*, I. L. R, 17 B, 41; but in these cases the impossibility of making an estimate arises from the uncertainty of

duration of the period for which the calculation is to be made. In the present case the calculation is to be made only for a definite time past and though the determination of the exact money value of the subject matter may be difficult I doubt whether it can be said to be 'not possible to estimate' that value; moreover Art. 17 (vi) of Schedule II of the Act applies only to suits 'not otherwise provided for' by the Act, and I am of opinion that this case is provided for if not by S. 7 (i) of the Act, suits for money, then by S. 7 (iv) (*f*), suits for accounts.

"In the latter case the last clause of the sub-section (iv) of S. 7 requires the plaintiff to state the amount at which he values the relief sought, and the plaintiff appears to have so stated the value at Rs. 32,785. It is upon this sum that in my opinion court fee (Rs. 1015) should be paid on the memorandum of appeal under Art. 1 of Schedule I of the Act, that being the amount at which the relief is valued in the plaint or memorandum of appeal."

K. Brown (with *Barclay, Morgan* and *Orr*) for appellants.

H. G. Wedderburn for the Acting Government Pleader, *contra*.

JUDGMENT:—The appeal is capable of being valued and it is for the appellants under S. 7, Cl. IV, (*f*), of the Court Fees Act to say what the value is.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Pemma Raju Gangga Raju and others. { Applts. (*Defts.* Nos. 1, 4, 5 & 6).*

v.

Kondreddi Swami and others ... { Respts. (1st & 2nd *Plffs.* & 2nd *Deft.*)

Ganga Raju v. Kondreddi Swami.

Res Judicata—Decision of Revenue Court on title—Rent Recovery Act VIII of 1865, S. 10.

In a suit for the recovery of property from which the plaintiff had been ejected under an order of ejectment under S. 10 of the Rent Recovery Act passed in pursuance of a decision compelling the acceptance of a patta by a Revenue Court, *held*, that the plaintiff's title to recover was not barred by the decision of the Revenue Court.

Rama v. *Tirtasami*, I. L. R, 7 M, 61 followed. *Ragava* v. *Rajagopal*, I. L R, 9 M, 89 disapproved.

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* S. A. No. 63 of 1893. 30th August 1893.

Second Appeal against the decree of the Subordinate Judge of Ellore in Appeal Suit No. 197 of 1892, confirming the decree of the District Munsif of Tanuku in Original Suit No. 95 of 1891.

This was a suit for the recovery of certain lands from the defendants. The 1st defendant had instituted a suit before the Revenue Court to enforce acceptance of patta against the 1st plaintiff and obtained an *ex parte* decree. The decree not having been complied with, the 1st defendant obtained an order for ejectment under S. 10 of the Rent Recovery Act and the 1st plaintiff was accordingly ejected on the 22nd of November 1890. He applied for a review of the *ex parte* decree but the petition was dismissed by the Revenue Court. The defendants pleaded that the decision of the Revenue Court, and the order of ejectment operated as a bar to the maintenance of the present suit. The District Munsif relying upon *Rama* v. *Tirtasami*, I. L. R, 7 M, 61, *Chunder Coomarundal* v. *Numer Khanum*, 11 B. L. R, 434, *Debi Prasad* v. *Jafar Ali*, I.L.R, 3 A, 40, *Boistub Churn Sein* v. *Trahee Ram Sein*, 15 W. R, 32, held that the decision of a Revenue Court was no bar to a suit brought in the regular courts, and gave a decree for the plaintiffs. On appeal the Subordinate Judge confirmed the Munsif's decision.

The defendants Nos. 1, 4, 5 and 6 preferred this second appeal to the High Court.

M. E. Srirangachariar for appellants.

E. Venkatarama Sarma for respondents Nos. 1 and 2.

JUDGMENT :—Assuming that the suit was maintainable there can be no doubt that the decision is correct on the facts found.

It is contended however that the suit is not sustainable by reason of the decree in summary suit No. 72 of 1890 on the file of the Head Assistant Collector and of the order for ejectment under S. 10 of Act VIII of 1865 (Madras).

The 1st plaintiff did not appear to defend that suit and a subsequent application of his to have the *ex parte* decree set aside was dismissed. Hence the present suit on title.

As was held in *Rama* v. *Tirtasami*, I. L. R, 7 M, 61, the decision of a question of title by a Revenue Court is merely incidental and no bar to a fresh suit on title in a Civil Court. Our attention has been called to the decision reported in I. L. R, 9 M, 39, *Ragava* v. *Rajagopal*.

The learned judges who decided that case held that the decision and order of a Revenue Court under S. 10 of Act VIII of 1865 would bar a subsequent suit on title in the Civil Courts. But it does not appear that the decision in I. L. R, 7 M, 61 was brought to their notice. We are of opinion that the principle laid down in I. L. R, 7 M, 61 is correct.

NOTE:—See *Venkatachalapati* v. *Krishna*, I. L. R, 13 M, 291; *Oliver* v. *Markanda Ayyan*, 3 M. L. J. Rep, 263.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best

Abdul Rahiman Sahib ... ... Appellant (*Plaintiff*).*

v.

Anna Pillai .. .. .. Respondent (*Defendant*).

Rent Recovery Act (Madras) VIII of 1865, S. 10—Suit to enforce acceptance of patta—Jurisdiction of Revenue Court—Question of title.

In a suit by a person claiming as permanent lessee of certain Inamadars to enforce acceptance of patta, the Revenue Court is bound to decide questions of title raised by the defendants.

Rahiman Sahib *v.* Anna Pillai.

Narayanachariar v. *Ranga Ayyangar*, I. L R, 15 M, 223 and *Ayyappa* v. *Venkatakrishnamarazu*, I. L. R, 15 M, 485 followed.

Per cur: Whenever a court is invested with jurisdiction to determine the existence of a particular legal relation, the intention must be taken to be to authorize it to adjudicate on every matter of fact or of law incidental to such adjudication.

Second Appeal against the decree of the District Judge of Trichinopoly in Appeal Suit No. 79 of 1891, reversing the decision of the Deputy Collector of Trichinopoly in Summary Suit No. 4 of 1890.

The facts of this case appear sufficiently from the following judgment of the High Court.

R. Balaji Row for appellant.

K. P. Sankara Menon for respondent.

JUDGMENT:—This was a suit to enforce the acceptance of a patta under Act VIII of 1865. The land in respect of which the patta was tendered admittedly belongs to a mosque called

* S. A. No. 1425 of 1892. 23rd October 1893.

Kazi Abdulla Azari's mosque. Appellant claimed to be respondent's landlord under a permanent lease granted to him by one Abdul Rahiman and his three sisters whom he described to be entitled to the land. He further alleged that respondent was a tenant cultivating about 4 acres of land. It was conceded that appellant duly tendered a patta but respondent denied that the former was his landlord. He contended that Abdul Rahiman granted a lease for 35 years to one Raghavendra Row who sublet the land to him. The first issue in the case was whether appellant's lessors were competent to execute the permanent lease in his favor and the Deputy Collector decided the question in appellant's favor, observing that Abdul Rahiman who granted the lease to Raghavendra Row was only one of four Inamdars, whilst all the four Inamdars granted the permanent lease to appellant, that Raghavendra's lease was further a *benami* transaction, and that it was never acted upon. On appeal, the judge dismissed the suit and rested his decision on the ground that respondent's contention raised a *bona fide* question of title which ousted the jurisdiction of the Deputy Collector. It is argued on appellant's behalf that the judge is in error in dismissing the suit for the reason that there was a *bona fide* dispute as to title and that he should have proceeded, as was done by the Deputy Collector, to adjudicate upon it. It is provided by S. 10, Act. VIII of 1865, that the Collector shall first enquire whether the party was bound to accept a patta and give a muchilka and that unless this is proved, the suit thall be dismissed with costs. Whilst it is thus clear that the judge is bound to decide whether the relation of land-holder and tenant for the year for which the patta is tendered subsists, there is no provision in the Act that a *bona fide* denial of that relation is a good defence or ousts the jurisdiction of Revenue Courts.

Whenever a court is invested with jurisdiction to determine the existence of a particular legal relation, the intention must be taken to be to authorize it to adjudicate on every matter of fact or of law incidental to such adjudication. The judge ought to have determined whether Raghavendra Row's lease was acted upon, whether it was not a *benami* transaction, or whether the actual relation of landlord and tenant existed as between appellant and respondent; otherwise a tenant who was originally let into

possession by it and paid him rent for a series of years may collude with an adverse claimant and render his landlord's right to tender a patta infructuous.

The decision in *Narayanachariar* v. *Ranga Ayyangar,* I. L. R, 15 M, 223 proceeds on this principle. There the suit was brought by the tenant and the landlord denied the tenancy. The Head Assistant Collector dismissed the suit observing, "as a question regarding the existence or otherwise of the relationship of landlord and tenant has arisen in this case, the matter must be determined in the regular way." The District Judge concurred in that opinion but the High Court remanded the case for trial on the merits and the learned judges observed, "The judge is to try the case. The plaintiff's case is that he is a tenant and entitled to a patta which defendant denies. To say that the Collector is to hold his hand and make no further inquiry merely because the landholder denies that plaintiff is tenant is to put it in the power of the landholder always to deprive the tenant of the remedy by summary suit given him by S. 8."

Again, in *Ayyappa* v. *Venkatakrishnamarazu,* I. L. R, 15 M, 485 the tenant's defence was that though he was a tenant in the Zamindari, the plaintiff was a member of an undivided family together with three other persons, that the defendant had already accepted patta and executed a muchilka made out in the names of the plaintiff and his two coparceners. The District Judge held that the plaintiff being the registered Zamindar had a right to compel defendant to accept the patta and the High Court upheld the decision as correct. These are the latest decisions on the question and the principle on which they rest appears to be open to no objection.

We set aside the decree of the District Court and remand the case for trial on the merits. Costs of this appeal will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arthur J. H. Collins and Mr. Justice Davies.

Ramasami Thevan ... ... Applt. (*Plff.*) *

v.

Sami Aiyan and others .. .. Respdts. (*Defts.*)

* S. A. No. 221 of 1893. 29th August 1893.

Ramasami Thevan v. Sami Aiyan.

Res judicata—Second suit for redemption—Merger of cause of action in decree.

Where a decree for redemption directed that on plaintiff's failure to pay within a certain time the right to redeem should be barred, a second suit for redemption after the lapse of the period specified does not lie.

Second Appeal against the decree of the Subordinate Judge of Tanjore in Appeal Suit No. 365 of 1892, confirming the decree of the District Munsif of Mannargudi in Original Suit No. 66 of 1891.

Plaintiff as a purchaser of the equity of redemption in certain properties brought Original Suit No. 241 of 1886 for redemption of the mortgage of 1886 against the mortgagee and his sub-mortgagees. He obtained a decree dated the 30th September 1887 in the following terms:—" On the plaintiff paying to the defendants Nos. 2 to 7 or depositing in court within three months from this date Rs. 67 he will be entitled to the plaint's items Nos. 1 to 6 and in default he will be debarred from redeeming them thereafter." This decree was confirmed on appeal on the 10th March 1888. In 1889 long after the three months specified in the decree, plaintiff moved for execution of the decree and sought delivery of possession of lands on payment of the money. He obtained an order in his favor but on second appeal the High Court dismissed the application for execution on the ground that the application was too late on the 22nd of January 1891. Plaintiff instituted the present suit on the 13th February 1891 " for a decree directing the defendants to receive from him the mortgage-money and to return the documents relating to the mortgage and holding that the mortgage has been redeemed." The defendants pleaded that the plaintiff's cause of action was merged in the former decree and the plaintiff's suit was barred. The District Munsif dismissed the suit holding that the right to redeem was extinguished. The Subordinate Judge confirmed his decree.

The plaintiff preferred this second appeal to the High Court.

P. T Narasimhachariar for appellant: referred to the following authorities :—

Sami v. *Somasundram*, I. L. R, 6 M, 119; *Periandi* v. *Angappa*, I. L. R, 7 M, 423; *Karuthasami* v. *Jaganatha*, I. L. R, 8 M, 478; *Ramunni* v. *Brahma Dattan*, I L. R, 15 M, 366; and Ss. 92 and 93 of the Transfer of Property Act.

V. Krishnaswami Aiyar for respondents Nos. 2 to 7.

JUDGMENT:—We consider that the decree in suit No. 241 of 1886 on the Mannargudi Munsif's file was a final decree in as much as it decreed according to the last clause of S. 92 of the Transfer of Property Act that in case of default in payment within the stipulated time, the plaintiff was to be debarred of his right of redemption. Orders passed under S. 93 are in our opinion merely supplementary to the decree under S. 92, showing whether the terms of the decree have or have not been fulfilled. It is clear that in this case when the three months' time allowed in the decree had elapsed without payment having been made, the decree became a final decree without any further orders being required. That decree then being a final one after confirmation in appeal, the present suit being based on precisely the same cause of action as in that suit, is of course barred as *res judicata*.

The second appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, Kt. Chief Justice and Mr. Justice Davies.

Ramappa Udayan ... ... Appellant (1st *Defendant*).*

v.

Armugath Udayan ... ... Respondent (*Plaintiff*).

Ramappa Udayan. v. Armugath Udayan.

Hindu law—Daughter's daughter—*Bandhus.*

A daughter's daughter is a *bandhu* and can succeed in the absence of preferential male heirs.

Second Appeal against the decree of the Subordinate Judge of Kumbakonam in Appeal Suit No. 7 of 1892, presented against the decree of the District Munsif of Tiruvarur in Original Suit No. 480 of 1890.

P. S. Sivaswami Aiyar for appellant: referred to the following:—West and Buhler's Digest of Hindu law, pp. 477 and 510; Siromani's Hindu law, 1st Ed., p. 293; Mandlik's Vyavahara Mayukha, pp. 357, 364 to 377; Sarvadhikari's Law of Inheritance, p. 663, &c.

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* S. A. No. 23 of 1893. 24th October 1893.

The respondent was not represented.

JUDGMENT :—We think the case quoted by the Subordinate Judge at I. L. R, 14 M, 149, *Nallanna* v. *Ponnal,* is sufficient authority for holding that a daughter's daughter is a *bandhu* on the principle laid down that consonquinity may be recognized as the basis of title to succession in the absence of preferential male heirs, Minakshi was a direct relation by blood to her grandfather through her mother his daughter.

The second appeal therefore fails and is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Muthusami Aiyar and Mr. Justice Davies.

Namasivaya Gurukkal and others ... Appellants (*Defendants*).*

v.

Kadir Ammal and others ... ... Respondents (*Plaintiffs*).

Namasivaya Gurukkal *v.* Kadir Ammal

Assignment of contract—Personal considerations—Rights coupled with liabilities—*Res judicata*—Suit of a small cause nature—Similar conditions of appealability.

Where a contract is entered into with reference to personal considerations such as the skill, character, credit, or substance of the parties, or where contractual rights are coupled with liabilities : *held,* that rights conferred by the contract cannot be assigned.

Arkansas Valley Smelting Company v. *Belden Mining Company,* 127 United States Rep., p. 379, followed.

In order to constitute a decision *res judicata* for the purpose of barring the trial of a subsequent suit or issue the former decision must be rendered by a court which is competent not merely to try a subsequent suit but is also competent to try it subject to similar conditions of appealability. Where accordingly a suit is of a small cause nature and admits only of an appeal but not of a second appeal a decision in such suit will not bar the trial of a subsequent suit in which a second appeal would lie to the High Court.

Govind Bin Lakshman Shet v. *Dhondbarav Bin Ganbarav Tambye,* I. L. R, 15 B 104, and *Vithilinga Padayachi* v. *Vithilinga Mudali,* I. L. R, 15 M, 111 followed.

Second Appeal against the decree of the District Judge of Madura in Appeal Suit No. 304 of 1890 presented against the decree of the Additional District Munsif of Sivaganga in Referred Suit No. 137 of 1888.

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* S. A. Nos. 93 to 104 of 1892. 5th October 1893.

The facts and arguments of this case appear sufficiently for the purposes of this report from the following judgment of the High Court. The agreement sued upon was in the following terms:—

1. We having hereby bound ourselves to present a petition to take into the factory and heap up in your name all the salt, which, upon obtaining a license according to the excise rules of the new scheme, we manufacture and collect for 7 years from 11th April 1885, up to the 10th April 1892, in the undermentioned salt pans, which were formerly enjoyed by our ancestors and which are now in our enjoyment, in the salt factory of Vattanam situated to the west of the sea, north of river, east of Rettanfield and south of Manjalkarichanpattal in the village of Vattanam, Oriyur Taluq, Ramnad Zamin, attached to Tiruvadanai Sub-District, Madura District, we shall, as directed by you or your agent, collect the salt, take it into the factory after previously presenting a petition in your name according to the Government rules, heap it up as directed by you, put clay over the said heaps, press the clay that every day, put clay over the said heaps after two weeks, press the same, put a covering of sand so as to fill the cracks in the clay and make the heap safe and deliver it. Within four months from the date of delivery you shall pay each of us individally at the rate of Rs. 11-8-0 per garce of salt and obtain receipts from us.

2. For the salt which we weigh and take into the factory and deliver safely as mentioned in para. 1, you or your agent shall then and there make out and give each of us a katchat separately.

3. We shall at our own cost execute the work of the backwater, channel, small channel, well, pan and *pannai*, relating to the manufacture of salt.

4. All taxes payable by us to the salt department as stipulated in the license, shall, according to the new scheme (rules)of the salt department, be paid by you.

5. All kinds of repairs that we might, according to the rules framed by Government, be ordered to execute, save those mentioned in para. 3, shall be executed at your cost.

6. For the aforesaid seven years you should accept the salt that is collected and given to you according to the estimate framed by you. Further, you alone shall conduct matters being our representative in respect of all our interests in the said factory during the said seven years.

7. The sale of the said salt shall be effected by you. If the under-mentioned salt pans be left waste by not collecting salt from them and if no sufficient ground such as an adverse weather, be shown in regard to taking (failure to take) into the factory, each of us shall, separately, be bound to pay you and shall pay you at the rate of Rs. 5-12-0 per garce of salt for damages sustained by you and the loss sustained owing to the quantity falling short of the estimate.

8. At the end of the last year of the term, we shall, after the sale of all the salt brought into the factory by your name, sell according to our pleasure the salt that we collect.

S. Subramaniem for appellant No. 2.

P. S. Sivaswami Aiyar and *V. Krishnaswami Aiyar* for appellants.

M. O. Parthasaradhi Aiyangar, *V. Bhashyam Aiyangar*, and *C. R. Tiruvenkatachariar* for respondents.

JUDGMEMT :—The seven defendants were salt manufacturers holding pans in the factory at Vattanam and they entered into the contract A. dated the 16th November 1884 with one Nur Mahomed engaging themselves in consideration of the said Nur Mahomed discharging the Government taxes and executing certain repairs and paying them at the rate of Rs. 11½ per garce of salt, to manufacture and store in the factory in the name of, and for the benefit of, the said Nur Mahomed such quantities of salt as he might require them to manufacture each season for seven years from 11th April 1885 to 10th April 1892.

It has been found as a fact by both the lower courts on the 4th issue raised in the case that the 1st plaintiff Mahomed Aliar Rowther (now deceased but represented by respondents Nos. 1 to 4) was a party with Nur Mahomed to the contract, though he is not expressly mentioned therein. The 1st plaintiff's share was 2 in 5⅝ shares; and Nur Mahomed's share was the balance 3⅝ shares. Nur Mahomed assigned his 3⅝ shares to 2nd plaintiff (now deceased but represented by respondents Nos. 5 and 6) under the deed of assignment Z dated 11th January 1886.

This suit was brought in February 1887 against the seven defendants alleging that while the contract had been fulfilled on both sides for the season of 1885 up to the 14th January 1886, the

defendants had failed to fulfil their part of it for the season of 1886 and praying that all the defendants should be directed to deliver to plaintiffs the salt they had collected and heaped in 1886, and that defendants Nos. 2, 4 and 7 should be specially held liable for any damages plaintiffs might suffer through a fall in the price of salt. There was also an incidental prayer that each defendant should be directed to execute a separate power of attorney to the plaintiffs as required by the salt department in lieu of a single instrument that had been jointly executed by them, and for a general declaration of plaintiff's rights. Several issues of law and of fact were raised at the trial, all of which have been found in favor of plaintiffs except that the agreement A was held good so far as the stamp duty was concerned only as against one of the defendants, and penalties were levied upon it in regard to the other six defendants, it being rightly held that it contained seven separate and distinct contracts, each defendant having entered into a separate engagement in regard to his own pans only. The decree of the Court of First Instance after a general declaration of plaintiff's rights including the right of the 2nd plaintiff to sue as the assignee of Nur Mahomed and a direction for each defendant to execute a separate power of attorney as prayed in the plaint, further directed each of the seven defendants to pay plaintiff's damages for the years 1886 to 1889 (the decree being dated 10th day of January 1890) at the rate of Rs. 5-12-0 per garce for the salt collected by each of them during those years leaving the quantity to be ascertained in the execution of the decree, and also directed the defendants to pay the plaintiff's costs.

It may as well at once be noted that this decree is bad in three different respects :—1st, in decreeing damages for the four years 1886 to 1889 and that against all the seven defendants when in the plaint damages for the year 1886 alone was or could be asked for and that against only defendants Nos. 2, 4 and 7, the claim against the others being only for the delivery of specific salt; 2ndly, in reserving for determination in execution what was necessary for determination by the decree itself, namely, the amount of each defendant's liability to damages; and 3rdly, in making the defendants jointly and severally liable to plaintiff's costs, when as it had been found that the contract of each was separate, they were liable only to pay costs on the amount of

damages assessed against each of them separately. The decree of the appellate court without remedying any of the defects noticed perpetuates and even aggravates them. Thus another year—the year 1885—is added to the other four years 1886, 1887, 1888, and 1889 for which all the defendants are to pay damages apparently jointly and severally and they are again in appeal also made severally and jointly liable for the plaintiffs' costs; the amount of their liability in damages being still left for determination in execution. The appellate court also enhanced the rate to be paid as damages from Rs. 5-12-0 to Rs. 45-10-0 per garce.

The chief points taken in second appeal by the first six defendants are as follows:—

(1) That the 2nd plaintiff had no right of suit on the assignment.

(2) That the suit was bad for misjoinder.

(3) That the decrees are defective in regard to the matters just pointed out, and

(4) That the rate allowed by the appellate court for damages is opposed to the terms of the contracts between the parties.

As to the 1st objection it is that Nur Mahomed was not competent to assign his interest in the contract A. It is argued that the contract was based on personal considerations and that the rights conferred upon Nur Mahomed by the contract were coupled with liabilities and that on both these grounds the contract was not assignable. In support of this contention the appellants' pleader relied on *Farrow* v. *Wilson,* L. R, 4 C. P., 744, *Humble* v. *Hunter,* 12 Q. B. R. P., 310, and *Arkansas Valley Smelting Company* v. *Belden Mining Company,* 127 United States Reports, 379. In *Farrow* v. *Wilson* the contract in suit was an agreement whereby the plaintiff undertook to serve one Pugh as farm bailiff, the agreement being terminable upon six months' notice on either side. The question for decision was whether the death of Pugh put an end to the contract which did not contain the word 'assigns' and it was held that it did. The ground of decision was that in contracts for personal service, it is an implied condition that death of either party should dissolve the contract. *Justice Willis* laid down the principle which governed the case in these terms;—"Where personal considerations are of the foundation of the

contract as in cases of principal and agent and of master and servant, the death of either party puts an end to the relation." The contract in *Humble* v. *Hunter* was a charter-party signed by the plaintiff's son on the one part and by the defendant on the other, and it recited that the son was the owner of the ship. The question was whether the plaintiff might show whether she was the real principal and that her son though he signed the contract was really agent. Two principles were discussed, *viz.*, (1) that a principal may come in and take the benefit of a contract made by his agent, and (2) that no parol evidence shall be admitted to contradict a written contract. It was held that the evidence was not admissble, the reason being that the son gave himself a special description and asserted a title to the ship as owner, and that this circumstance took the case out of the general rule, that a principal may sue upon the contract made by his agent. *Lord Denman; C. J.* referred to the general principle that a party to a contract has a right to the benefit he contemplates from the character, credit and substance of the party with whom he contracted. In the American case, the contract was to sell and deliver lead ore from time to time at the smelting works of a firm of partners, that the ore was to become upon delivery the property of the partnership and that it was to be paid for after a subsequent assay of the ore and ascertainment of the price. The question was whether the partnership might assign the contract as to future deliveries and it was determined in the negative. The court stated that every one has a right to select and determine with whom he will contract and cannot have another person thrust upon him without his consent. It also referred to the principle mentioned by Lord Denman, namely "you have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract." It referred to the rule in Pollock's Treatise on Contracts, Fourth Edition, p. 425, that rights arising out of a contract cannot be transferred if they are coupled with liabilities or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he confided. Applying that principle to the case before them the court remarked that during the time that must elapse between the delivery of the ore and the ascertainment and payment of the price the defendant had no security for the payment except in the

character and solvency of Billing and Eilers, the parties with whom he made the original contract. The defendant therefore could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom he had contracted.

Now in this case it will be seen from the terms of the contract A which are set forth in full in the judgment of the Lower Appellate Court, and need not therefore be repeated here, that by article (1) the defendants were to allow Nur Mahomed four months' time for payment after delivery of their salt to him, by article (4) that he was liable to pay the Government taxes and dues, by article (5) that he was to execute all but petty repairs, and by article (6) that he was to fix the quantity of salt to be delivered by defendants. There is therefore not only credit given to Nur Mahomed in the matter of payment but other liabilities are thrown upon him the discharge of which depended upon his solvency, and there is also a certain discretion vested in him in regard to the quantity of salt to be demanded. Further, the assignment Z upon which the 2nd plaintiff was suing was an assignment of an executory or continuing contract. The assignment was made on the 11th January 1886 and the breach of contract sued upon was for a breach subsequent to that date. So that we have here all the elements which we find in the principles above laid down for holding that the contract was based on personal considerations and that the assignment of it as an executory contract was invalid without the assent of the defendants. It is not pretended that such assent was expressly given, nor is there evidence on the record of such a character as would amount to a novation of the contract such as is contemplated by S. 62 of the Indian Contract Act. It is contended for the 2nd plaintiff that after the assignment to him the defendants accepted payment from him for salt delivered as is shown by entries in the accounts C to C_4 and D. But those accounts are kept in the name of the 1st plaintiff as well as of the 2nd plaintiff so that they afford no distinct proof of a direct recognition of the 2nd plaintiff's rights as assignee. On the grounds that have been stated we must allow the objection that the contract was one not capable of assignment to 2nd plaintiff and therefore that he had no right of suit under it.

[The court, after having decided the other objections raised, proceeded as follows :—]

In Second Appeal No. 94 the Munsif dismissed the plaintiff's suit as barred by *res judicata* but the judge reversed the Munsif's decree without apparently noticing this point. The appellant in this second appeal now urges that this suit should be dismissed on the ground stated but we do not agree with the Munsif that the case was *res judicata* by reason of the decision in a similar suit (No. 447 of 1886). Not only was that a suit of a small cause nature and therefore not open to second appeal, (*Govind Bin Lakshman Shet* v. *Dhondbarav Bin Ganbarav Tambye*, I. L. R, 15 B, 104 followed in *Vithilinga Padayachi* v. *Vithilinga Mudali*, I. L. R, 15 M, 111), but the simple issue therein decided was that plaintiff was not entitled to relief as he had not executed repairs. It was not decided that the contract was void or had been rescinded and the cause of action now though upon the same contract being for a different year, there is no *res judicata*. We therefore disallow this objection and as the other special objection is abandoned, this second appeal falls to be treated like the bulk of them, and will be dealt with accordingly by a reversal and remand with similar directions to find out and decree what actual amount is due by defendant to 1st plaintiff.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, Kt. Chief Justice and Mr. Justice Shephard.

Queen-Empress.*

v.

Marian Chetti and another.

Queen Empress *v.* Marian Chetti.

Indian Ports Act X of 1889, Ss. 6, 8—Rules framed under the Act—Disobedience of orders of Port conservator—*Ultra vires*—Delegation of power to make rules.

The accused having been convicted under S. 8 of the Indian Ports Act of the offence of disobedience to the lawful order of the conservator of the Negapatam Port to the effect that boats should not be brought in while the flag W was flying: *held*, that the order of the conservator was not a lawful direction given for the purpose of carrying into effect any valid rule passed under the Act.

* Crl. Rev. Case No. 273 of 1893. 1st September 1893.

Held also, that Rule V had no bearing upon the case and that Rule VIII which was framed under S. 6, Cl. (*k*), of the Act should be so construed as not to be in excess of the powers conferred by the said clause which was not intended to regulate the entry or exit of vessels in the matter of time.

Held further, that the charge could not be maintained as it was based on an alleged breach not of Rule VIII itself, but of a direction given by the conservator in pursuance of an authority conferred on him by Rule VIII and the Local Government had acted *ultra vires* in empowering him to make rules.

Where power is given by a statute to the Government or other public body to make rules having the force of law, the Government or such body cannot delegate its powers to other persons.

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code by the District Magistrate of Tanjore in his letter dated 2nd June 1893.

The facts of this case appear sufficiently from the following judgment of the High Court, and the sections referred to in the judgment are as follow:—

THE INDIAN PORTS ACT X OF 1889.

Power to make Port-rules,

Section 6:—(1).—The Local Government may, in addition to any other enactment for the time being in force, make such rules, consistent with this Act, as it thinks necessary for any of the following purposes, namely:—

(*a*) for regulating the time at which, and the manner in which vessels are to enter or leave any port subject to this Act;

* * * * * * * * * *

(*k*) for licensing and regulating catmarans plying for hire, and flats and cargo, passenger and other boats plying whether for hire or not, and whether regularly or only occasionally in, or partly within and partly without, any such port, and for determining the quantity of cargo or number of passengers to be carried by any such vessel;

* * * * * * * * * *

Power of conservator to give and enforce directions for certain specified purposes.

Section 8:—(1).—The conservator of any port subject to this Act may, with respect to any vessel within the port, give directions for carrying into effect any rule for the time being in force therein under section 6,

(2).—If any person wilfully and without lawful excuse refuses or neglects to obey any lawful direction of the conservator, after notice thereof has been given to him, he shall, for every such offence, be punished with fine and which may extend to one hundred rupees, and with further fine which may extend to one hundred rupees for every day on which, after such notice as aforesaid, he wilfully and without lawful excuse continues to disobey the direction.

(3).—In case of such refusal or neglect, the conservator may do, or cause to be done, all acts necessary for the purpose of carrying the direction into execution, and may hire and employ proper persons for that purpose, and all reasonable expenses incurred in doing such acts shall be recoverable by him from the person so refusing or neglecting to obey the directions.

RULES OF THE PORT OF NEGAPATAM.

(*Under Section* 6 *of the Indian Ports Act X of* 1889.)

RULE V :—*Keeping free passages, Clause* (*f*) :—A free passage shall be kept to all landing places, wharves and anchorages in accordance with such directions as may be issued on the subject by the conservator, and all vessels shall move when required by the conservator to clear such passages.

RULE VIII :—*Cargo boats, Clause* (*k*) :—The plying of catmarans, flats, cargo, passenger and other boats, whether for hire or not and whether regularly or only occasionally in, or partly within and partly without the port, and the quantity of cargo or number of passengers to be carried by any such vessel, shall be subject to such regulations as may be laid down from time to time by Government, and owners of such boats shall be subject to the control of the conservator, and shall carry out at all times all orders issued by him in connection with the plying of their boats and which are not inconsistent with the regulations issued by Government.

W. Grant and *N. Narayana Aiyangar* for the accused.

The Acting Public Prosecutor (*S. Subramaniem,*) in support of the conviction.

JUDGMENT :—The act charged as an offence is the bringing a boat into the Negapatam river in disregard of a general order passed by the port conservator to the effect that boats should not be brought in while the flag W is flying. This act is said to be punishable under S. 8 of the Ports Act. That section authorizes

the conservator to give directions for carrying into effect any rule passed under S. 6 of the same Act and goes on to make it penal to disobey any such lawful direction. It has therefore to be seen whether the conservator was carrying into effect any valid rule passed under the Act. The rules to which we have been referred are those numbered (v) and (viii) being rules passed with reference to clauses (*f*) and (*k*) of S. 6 respectively. In our opinion, there is clearly no connection between the former of these rules and the direction which in this case has been disobeyed.

Rule (viii) is a rule of wider scope for it requires boat-owners to "carry out at all times all orders issued by the conservator in connection with the plying of their boats and which are not inconsistent with the regulations issued by Government."

In order to put an interpretation on the Rule (viii) and to see whether it covers the present case we think that the rule must be read with the clause of the Act under which it is framed and the other clauses specifying the matter in respect of which rules may be made by the Government. It must be presumed that the Government intended to pass a rule which they were authorized to pass by the terms of clause (*k*) of the section and a construction which has the effect of extending the operation of the rule to matters not covered by clause (*k*) ought, we think if possible, to be avoided. Now when it is seen that by clause (*a*) of the section, the Government is empowered to make rules for regulating the time at which vessels are to enter or leave any port it seems tolerably clear that the rules to be framed under clause (*k*) were not intended to regulate the entry or exit of vessels in the matter of time. This being so, we do not think that Rule (viii) passed with reference to the latter clause can be taken to refer to such matters. Accordingly the direction of the conservator not to bring boats into the river when a certain flag is flying cannot be a direction for carrying into effect the rule in question and therefore no lawful direction was disobeyed. In referring to clause (*a*), we do not overlook the facts that boats may go out of the river without leaving the port. That may be so. We should still be disposed to think that the "regulation" intended by clause (*k*) was a regulation different in kind from that intended by clause (*a*).

There is however another reason why the conviction cannot be supported. The charge is not based immediately on an alleged breach of Rule (viii); indeed, no rule at all is mentioned in the charge. The conviction can only be supported on the ground that the direction of the conservator which was disobeyed was a direction lawfully given in pursuance of an authority lawfully conferred on him by Rule (viii) or some other rule. To support the conviction it has to be shown that the Government is by S. 6 of the Act authorized to empower other persons to make rules such as the one which has been disobeyed in the present case. In our opinion, the contention cannot rightly be maintained and if Rule (viii) or any other rule purports to give the conservator authority to make such rules, that rule is to that extent *ultra vires* and therefore void. In the case of power being by statute given to the Government or other public body to make rules having the force of law, the maxim *delegata potestas non delegatum* must, we think, be applied. When the legislature entrusts to some public body—it may be the Executive Government or a Corporation—the duty of making rules, such public body cannot, in our judgment, relieve itself of the responsibility and depute other agencies to discharge the duty. The authority to make rules must remain in the hands to which it was entrusted. It is absurd to suppose that the legislature intended this important authority to be exercised by any person whom the Government might choose to select. The rule laid down by the conservator may be a perfectly reasonable one and it may be one which the Local Government may make under S. 6. On this we offer no opinion. At present it is enough to say there is no such rule having the force of law and therefore the conviction as for breach of it must fall to the ground.

For these reasons we think the conviction should be set aside and the fine, if paid, refunded. We would add that in these cases where the charge in effect relates to an alleged breach of a rule passed under an Act, care ought to be taken to specify the particular rule said to have been infringed.

Ordered accordingly.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, Kt. Chief Justice and Mr. Justice Davies.

Chathanath Iluvapadi Ammu *alias* Madhavi Amma. } Appellants (3rd, 4th & 5th *Defendants*).*

v.

Chathanath Kunhunni Menon and others. } Respondents (*Plffs.* and *Defts.* Nos. 1 & 2).

Ammu *v.* Kunhunni Menon.

Valuation for appeal—Variation between plaint and decree—Limitation Act XV of 1877, Sch. II, *Arts. 123, 127—Suit for partition—Misjoinder—Liability of heirs of karnavan*—Receipt of assets.

Where the plaint in a suit in the Subordinate Court was valued at less than Rs. 5000, but the decree was for a sum exceeding Rs. 5000 as due at the date of suit, *held*, that the value of the suit for purposes of appeal must be taken as equal to the amount of the decree and that the appeal lay to the High Court.

Where six divided branches of a Malabar tarwad sued a seventh divided branch for their shares of the property which had belonged to an eighth branch which became extinct, *held*, that the suit was one for a *distributive share of the property of* an intestate and that Art. 123 and not Art. 127 of Schedule II of the Limitation Act applied to the suit.

The karnavan of the defendants' branch came into possession of the properties of the extinct branch and was apparently managing the same till his death on behalf of all the branches entitled to them: *Held*, that the defendants as his heirs were not liable to account for such properties to the plaintiff's branches unless they came into possession of his assets or he spent any of the properties for their benefit.

Held also, that the six branches of the plaintiffs were entitled to institute a single suit for their sixth-sevenths share of the properties and that the suit was not bad for misjoinder of causes of action.

Appeal against the decree of the Subordinate Judge of South Malabar at Calicut in revised Original Suit No. 30 of 1889.

Plaintiffs as representatives of six divided branches of one Chathanath tarwad sued the defendants Nos. 1—5 as representatives of a seventh branch for their 6/7ths share of the properties of an eighth branch which had become extinct on the death of one Narayana Menon in 1879. One Kannan Menon of the defendants' branch took out a certificate of succession to collect the outstandings due to Narayana Menon's estate. It was granted on his furnishing security to the extent of Rs. 1,000. The plaintiffs alleged that 5,000 Rs. was collected in pursuance of the certificate and that they were entitled to 6/7ths of that sum, the defendants being entitled only to 1/7th. The plaintiffs alleged also that the

* A. S. No. 131 of 1892. 14th August 1893.

defendants came into possession of the immovable and movable properties of the deceased Narayana Menon. They claimed therefore to recover $\frac{6}{7}$th's share of the immovable and movable properties and the sum of Rs. 1,000 the amount of the security, and they further claimed to make the defendants' $\frac{1}{7}$th share of the properties liable for the plaintiffs' share of the debts collected. Plaintiffs impleaded the surety in the succession proceedings as 6th defendant and sought to recover Rs. 1,000 from him in case of the defendants' default to pay it. The defendants No. 1—5 contended, *inter alia*, that the suit was bad for misjoinder as the plaintiffs were bound to sue separately for the share of each branch, that the claim was barred by limitation, that none of the outstandings were ever collected by, or came into possession of the defendants, and that they were not responsible for any amounts collected or misappropriated by Kannan Menon and that the defendants' $\frac{1}{7}$th share of the immovable and movable properties of Narayana Menon was not liable for the defaults or misappropriation of Kannan Menon. The Lower Court at first dismissed the suit on the ground of misjoinder but the judgment was reversed on appeal by the District Court and the case was remanded to the Subordinate Court for disposal on the merits. The Subordinate Judge then decided that the suit was not barred by limitation as Art. 127 of the Limitation Act applied to the suit. On the merits he held that as Kannan Menon was karnavan of the defendants' branch and came into possession of Narayana Menon's properties as such karnavan and as there was evidence that some of the defendants also participated in the management of Narayana Menon's estate the defendants were bound to account for the properties that came into possession of Kannan Menon and the debts collected by him. He accordingly gave the plaintiffs a decree for their $\frac{6}{7}$ths share of the immovable and movable properties and directed the defendants to pay to the plaintiffs a sum of Rs. 5,129 which was $\frac{6}{7}$ths of the debts collected by Kannan Menon and he further declared that the defendants' $\frac{1}{7}$th share of the properties should be liable for the plaintiffs' $\frac{6}{7}$th share. He also gave a decree for Rs. 1,000 against the 6th defendant as surety. The defendants Nos. 3, 4 and 5 appealed to the High Court.

P. R. Sundara Aiyar for appellants.

C. Sankara Nayar for respondents.

JUDGMENT :—The first question is one of valuation which is important with reference to the jurisdiction of this court to hear the appeal. The plaint was valued for the purposes of jurisdiction at Rs. 4069 odd, but the decree is for over Rs. 5,000, the Subordinate Judge having allowed a money claim for Rs. 5,129 as against a claim of Rs. 1,000 on which alone stamp duty was paid. The subject value of the suit must therefore be taken as equal to the amount of the decree, and the appeal therefore lies to this court. The plaintiffs must pay into this court within one month from this date the stamp duty on the total amount of Rs. 6,198-13-6 less the sum already paid by them in the Lower Court or their suit will stand dismissed.

The next question raised by appellants is that there was misjoinder in that each set of plaintiffs should have brought a separate suit for its share. The District Judge had decided this question against the apellants and we agree in that decision.

The next point is limitation. We think the Subordinate Judge was wrong in treating the case as one under Art. 127 of the second schedule of the Limitation Act, because the property in dispute was no longer joint property. We consider the article applicable to be Art. 123, as a suit for a distributive share of the property of an intestate, for which a period of twelve years is also allowed. Taking this as the period, this suit is admittedly in time, Narayana Menon the intestate having died in 1879 and this suit being broughtin 1889, *vide, Kasmi* v. *Ayishamma,* I. L. R, 15 M, 60.

In regard to the merits, the decree of the Subordinate Judge is clearly wrong in making the appellants (defendants Nos. 3 to 5) personally liable to pay the amount of Rs. 5,129 found due to plaintiffs under schedule B, as no personal decree was asked for, nor could it be given as the defendants were at the most only liable for the default of the senior male member of their family. Nor can the decree be construed as binding the tarwad property in their possession for there was also no prayer in the plaint to make that property liable. All the plaint prayed for was to make the amount a charge upon the 1/7th share of the defendants Nos. 1 to 5 in the property, schedule A, and that the Subordinate Judge has

also wrongly decreed because there is no evidence that defendants Nos. 3 to 5 received any assets or participated in any benefit derived from the funds to be accounted for by their deceased senior male member. He received the debts as senior male member of other branches of the tarwad besides the branch of the defendants, and there is nothing to show that he spent the money for the benefit of any of the branches, much less on the particular branch to which defendants Nos. 1 to 5 belong. We must therefore exonerate the defendents Nos. 3 to 5 who have appealed from liability to pay the amount of Rs. 5,129 either personally or on the security of the $\frac{1}{7}$th share referred to above. The effect of our decision is to allow the appeal so far as this amount is concerned and in other respects we confirm the decree of the Lower Court. The Appellants and respondents will pay their own costs in the Lower Court and in this court.

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derived from the funds to be accounted for by their deceased senior male member. He received the debts as senior male member of other branches of the tarwad besides the branch of the defendants, and there is nothing to show that he spent the money for the benefit of any of the branches, much less on the particular branch to which defendants Nos. 1 to 5 belong. We must therefore exonerate the defendents Nos. 3 to 5 who have appealed, from liability to pay the amount of Rs. 5,129 either personally or on the security of the 1/7th share referred to above. The effect of our decision is to allow the appeal so far as this amount is concerned and in other respects we confirm the decree of the Lower Court. The Appellants and respondents will pay their own costs in the Lower Court and in this court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, Kt. Chief Justice and Mr. Justice Shephard.

Kurungot Parkum Cheruvally Kanaran Nair and another ... ... } Appellants (*Plffs.*)*

v.

Kunyil Parkum Cheruvat Raman Nambiar ... ... } Respondent (*Deft.*)

Kanaran Nair *v.* Raman Nambiar.

Malabar law—Ottidar's right of pre-emption—Property sold by court auction with notice to ottidar—Waiver.

Where property subject to an otti is sold under a court sale and purchased by the plaintiff, *held*, that the ottidar who was a party to the suit in which the sale was held did not waive his right of pre-emption by mere notice of the date of sale. *Cheria Krishan* v. *Vishnu*, I L R, 5 M, 198 followed, and *Ammotti Haji* v. *Kunhayen Kutti*, I. L. R, 15 M, 480 distinguished.

Second Appeal against the decree of the District Judge of North Malabar in Appeal Suit No. 596 of 1891, setting aside the decree of the District Munsif of Pynad in Original Suit No. 285 of 1891.

This was a suit by the plaintiffs as auction-purchasers of certain land subject to an otti in favor of defendant, to redeem the otti. The defendant pleaded a right of pre-emption. The defendant had been a party to the suit under the decree in which the

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* S. A. No. 698 of 1892. 27th October 1893.

property was sold and purchased by the plaintiff. The District Munsif gave a decree for the plaintiffs holding that notice had been given to the defendant at the time of sale and that the defendant had waived the right of pre-emption. On appeal the District Judge set aside his decree and allowed the defendant's right of pre-emption.

The plaintiffs preferred this second appeal to the High Court.

This case came on for hearing on the 30th January 1893, when the Court (*Parker* and *Shephard, J.J.*) made the following order.

C. Sankaran Nair for appellants.

K. P. Sankara Menon for respondent.

ORDER :—The question of waiver is one of fact. The District Judge while reversing the District Munsif's judgment, does not notice Exhibit K nor the evidence mentioned in the eighth paragraph of the District Munsif's judgment. If it is found that the defendant was invited to attend the sale but expressed his inability to buy, that would probably be a case of waiver.

On the other hand, if he said nothing one way or the other, the question may arise whether the decision in I. L. R, 15 M, 480 does not become applicable. We must ask for a distinct finding on the question whether the right of the ottidar is still subsisting.

[On receipt of the above order the District Judge found that there was no express waiver, but that the defendant had notice given to him of the date of the sale.]

This case again came on for final hearing on the 17th of October 1893 and the court (*Collins, C.J.* and *Shephard, J*) delivered the following judgment.

JUDGMENT :—It is found that there was no waiver on the defendant's part of his right of pre-emption. It is also found that he was apprised of the fact that an auction sale of the property was about to take place on the 17th October. Notice to that effect was given to him by the decree-holder, the present plaintiff and ultimate purchaser at the sale. Such being the facts of the case, it appears to us that when the property was put up for sale the defendant had clearly not lost his right of pre-emption. According to the decision in *Cheria Krishnan* v. *Vishnu,* I. L. R, 5 M, 198 he

was entitled to know the price for which the property was being offered for sale in order that he might make up his mind whether or not he would buy. Until he had that information, he was not put to his election. In the case cited and relied on for the appellants, *Ammotti Haji* v. *Kunhayen Kutti,* I. L. R, 15 M, 480, it may be that there was evidence on which it could be held that the ottidar had been placed in a position to elect. In the present case there are no such facts and it seems to us unreasonable to hold that an ottidar having notice of an execution sale is bound to attend the sale and claim the property from the bidder to whom it is knocked down and is not at liberty to make the same claim the next day. It might as well be contended that he is bound to be present at negotiations for a private sale on the penalty of losing his right of pre-emption, if absent. We observe that the decision in I. L. R, 5 M, 198 is not overruled in the latter case and is not even mentioned by *Muthusami Aiyar, J.*

In our opinion that case cannot be distinguished from the present. The result is that the appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Sheik Davud Saiba and others ... Applts. (*Plff's.* 1, 3 & 4).*

v.

Hussein Saiba and others ... Respdts. (*Defendants*).

Davud Saiba v. Hussein Saiba

Religious Endowments Act XX of 1863—Appointment of additional trustees by a Mahomedan committee—Illegality of—Regulation VII of 1817.

The committee under Act XX of 1863 is competent when there is no hereditary trustee of the mosque to add to the number of the existing trustees and has the same powers as were possessed by the Board of Revenue under Regulation VII of 1817, but the power being discretionary should be exercised reasonably and in good faith, and its improper exercise is capable of being controlled by a court of justice

Second Appeal against the decree of the District Judge of South Canara in Appeal Suit No. 171 of 1891, reversing the decree of the District Judge of Kundapoor in Original Suit No. 73 of 1890.

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* S A. No. 38 of 1893. 21st December 1893.

This was a suit for a declaration by certain trustees of a mosque that the appointment of 1st to 6th defendants as additional trustees by the members of a Mahomedan committee was illegal and not beneficial to the interests of the mosque. The District Munsif declared the appointment to be illegal, but on appeal the suit was dismissed by the District Judge.

The plaintiffs Nos. 1, 3 and 4 preferred this second appeal to the High Court.

R. Runga Row for *C. Ramachandra Row Saheb* for appellants.

C. R. Pattabhirama Aiyar for respondents.

The court made the following order.

ORDER :—It is urged on appellants' behalf that the committee constituted under Act XX of 1863 acted *ultra vires* in appointing six additional trustees to the plaint mosque without any necessity for so doing.

It is certainly competent to the committee when there is no hereditary trustee to add to the number of the existing trustees and it has the same powers which the Board of Revenue had under Regulation VII of 1817. Section 13 of that Regulation authorizes the Board of Revenue to make provision for the administration of religious and charitable endowments. It was also held by this court in Regular Appeal No. 31 of 1888 that the committee might validly appoint new trustees where the right of management is not hereditary. It is then contended that the power conferred on the committee, it is bound to exercise reasonably, and in good faith, in furtherance of beneficial administration, and this contention is entitled to weight. The power conferred on the committee is no doubt discretionary but the principle embodied in S. 49 of the Indian Trusts Act, *viz.*, that when such discretionary power is not exercised reasonably and in good faith, such power may be controlled by a Civil Court of Original Jurisdiction, is equally applicable to public trusts. There is nothing in Act XX of 1863 or in Regulation VII of 1817 to support respondent's suggestion that the power is absolute.

The second issue raised the question and the District Munsif held that the committee exercised the power otherwise than reasonably and in good faith. But the judge has expressed no opinion. Before disposing of this second appeal we shall ask the

judge to return a finding as to whether the appointment of additional trustees was a reasonable, *bona fide*, exercise of their power, conducive to beneficial management. Additional evidence may be admitted.

[In compliance with the above order, the District Judge returned a finding that the power had not been exercised unreasonably]. On receipt of this finding the court (*Muthusami Aiyar* and *Best, JJ*) dismissed this appeal with costs.

FULL BENCH.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, Kt. Chief Justice, Mr. Justice Muthusami Aiyar, and Mr. Justice Shephard.

Sivakami Ammal ... ... Appellant (*Plaintiff*).*

v.

Gopala Savundram Aiyan and another ... Respts. (*Defts*).

Sivakami Ammal *v.* Gopal Savundram Aiyan.

Mortgage instrument—Covenant to pay—What amounts to.

Where a usufructuary mortgage instrument provides, *inter alia*, " I shall pay you the said mortgage amount in Chittrai, 1883," *held*, that there is a personal covenant to pay.

Appeal against the decree of the District Judge of Trichinopoly in Original Suit No. 26 of 1889.

This case came on for hearing before *Parker* and *Shephard, JJ.* on the 14th December, 1891, when their lordships made the following order of reference to the Full Bench :—

ORDER.—The District Judge has held that the mortgage executed by the 1st defendant in favor of the plaintiff's late husband is purely a usufructuary mortgage and that, therefore, the suit which is brought to recover the money secured against the defendant personally and by sale of the property is not maintainable.

If the mortgage instrument contains a covenant on the part of the defendant to pay the money, we think there can be no doubt that the action lies. The clause on which the plaintiff relies is as follows :—

" I shall pay you the said mortgage amount of Rs. 3,000 in Chittrai Kalavadi of the year 1883 and take back this deed of

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* A. S. No. 25 of 1891. 24th November 1893; 7th December 1893.

mortgage with possession and the cancelled bonds mentioned above." The mortgage instrument is dated 10th May 1878. Clearly the clause quoted imports a covenant to pay the mortgage money. But it is said that the clause which immediately follows shows that no covenant was intended. That clause runs thus :—

"If I fail to pay the mortgage amount in the said Kalavadi, then you shall receive the said mortgage amount in the Chittrai Kalavadi of whatever year I may pay it, deliver the said lands to my possession, having cleared off the arrears of Government revenue and also give back the bond."

We are unable to see that the clause is in any way inconsistent with the preceding one.

By the first clause, the mortgagor covenants to repay the money in the cultivation season of 1883 : by the 2nd clause, it is stipulated that on the mortgagor's default to pay the money in 1883, the mortgagee shall accept payment of the same in any later cultivation season. In other words, this second clause, which, like the first, is for the immediate benefit of the mortgagee, limits the discretion of the mortgagor to repay the money and redeem the land.

Naturally the mortgagee was anxious not to be called upon to give up his security except at a season when the land could not, in the nature of things, be bringing him in any profit.

In our opinion the covenant to pay is not affected by the clause, but inasmuch as in the case cited (Appeal No. 4 of 1891) the *Chief Justice* and *Wilkinson, J* have taken a different view of the manner in which a similar document (the terms of which we are unable to distinguish) should be construed, we refer to the Full Bench the question, "whether plaintiff is entitled to sue for sale under the provisions of the Transfer of Property Act."

In pursuance of the above reference, this case came on for hearing on the 24th November 1893 before a Full Bench consisting of *Collins, C. J., Muthusami Aiyar, J.,* and *Shephard, J.* when their lordships delivered the following judgment.

C. R. Pattabhirama Aiyar for appellant.

H. G. Wedderburn for respondents.

JUDGMENT :—We are clearly of opinion that the mortgage contains a covenant to pay and that therefore a suit for sale lies.

[In accordance with the opinion of the Full Bench, the Division Bench, *Collins, C. J.*, and *Shephard, J.*, reversed the decree of the District Court and remanded the suit.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :-- Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Maddi Ramayya and another ... Appellants (1st & 2nd *Defts.*).*

v.

Chidella Venkataratnam ... Respondent (*Plff.*)

Ramayya *v.* Venkataratnam

Hindu law—Son's liability to pay father's debts—Decree against father—Suit against sons after father's death—Civil Procedure Code, Ss. 43, 244—Limitation Act XV of 1877, Sch. II, Art. 120—Non-joinder of plaintiff.

Where a money decree payable by instalments had been obtained against a Hindu father and two of his sons and an application for execution on the father's death against two other sons born after the decree had been dismissed, *held*, (1) that a suit by the creditor for the recovery of the instalments then due from the ancestral property in the hands of the latter is not barred by S. 244 or S. 43 of the Code of Civil Procedure, or by any other rule of law: *Arunachala* v. *Zamindar of Sivagiri*, I. L. R, 7 M, 328, *Natasayyan* v. *Ponnusami*, I. L. R, 16 M, 99, *Hanumantha* v. *Hanumayya*, I. L. R, 5 M, 232, followed; (2) that the suit was not for mere declaration under S. 283 in respect of instalments already due but for their recovery, the order refusing execution against the sons having been passed under S. 244 of the Code; (3) that the suit was not barred by limitation as Art. 120 of the Limitation Act applied and the time began to run in respect of instalments that became due after the father's death from the dates on which they fell due: *Natasayyan* v. *Ponnusami*, I. L. R, 16 M, 99, distinguished; (4) that the plaintiff was only entitled to a declaration in respect of instalments which had not become due at the date of suit; (5) that the non-joinder of the plaintiff's undivided brother was only an immaterial irregularity by reason of the amendment made in the plaint by which the plaintiff was described as the managing co-parcener and representative of his joint family.

Appeal against the decree of the District Judge of Kistna at Masulipatam in Original Suit No. 7 of 1891.

The facts of this case appear sufficiently from the following judgment of the High Court.

C. R. Pattabhirama Aiyar and *E. Venkatarama Sarma* for appellants.

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* A. S. No. 91 of 1892. 31st October 1893.

The Advocate-General (*J. H. Spring Branson*) for respondent.

JUDGMENT :—Appellant's father, Maddi Chidambarayya, was judgment-debtor and respondent Venkataratnam was execution-creditor in Original Suit No. 5 of 1877 on the file of the District Court of Kistna: Besides the minor appellants who were twins, Chidambarayya had two other sons named Veerayya and Rama Murti and subsequent to the decree in the above suit, the former died in co-parcenary without issue and the latter died leaving him surviving two minor sons, 3rd and 4th defendants in the present suit. Prior to 1873, Chidambarayya had dealings with Venkataratnam for several years and on the 19th March of that year the former executed in favor of the latter the mortgage A as security for the sum of Rs. 8,000 then found due by the one to the other. It was upon this mortgage, Original Suit No. 5 of 1877 was brought against Chidambarayya and his two elder sons Veerayya and Rama Murti but only a money decree was obtained against them. The decree directed them to pay respondent Rs. 9,677-2-5 with interest at 6 per cent. per annum from date of suit to date of decree, Rs. 6000 odd in three specified instalments of 1877 and 1878 and the balance Rs. 4250 by yearly instalments of Rs. 250 commencing with the 1st May 1879. The decree was passed on the 19th October 1877 and Chidambarayya died on the 28th December 1883 after having paid part of the debt. On the 19th April 1888, respondent applied for execution against Chidambarayya's four sons, *viz.*, Virayya and Rama Murti who were parties to the decree and against appellants who, as alleged by respondent, are twins born subsequent to the suit and in pursuance of this application he attached some of the property belonging to Chidambarayya's family. On appellants objecting to the attachment so far as it affected their shares, the District Court raised it on the ground that the younger sons were not parties to the decree under execution and that a fresh decree should be obtained against them before the property which passed to them by survivorship could be proceeded against in execution. The District Court made its order on the 18th September 1889 and on appeal preferred from that order under S. 244, Civil Procedure Code, the High Court confirmed it on the 21st October 1890. Hence this suit.

In his plaint, respondent prayed for a decree declaring that defendants are bound to pay at once on the liability of the entire

family property including their interest and already caused to be attached, Rs. 1,792, the amount of six past instalments from 1st May 1885 to 1st May 1890 and Rs. 1,250 the amount of five future instalments when they become due with the condition of paying interest in default of payment on the due date as per terms of the decree in Original Suit No. 5 of 1877. The plaint prayed also for an injunction, for costs of the suit and for such other reliefs as the court may deem it proper to grant.

Respondent's case was that as sons taking ancestral property by survivorship on the death of their father, appellants were liable for the debt sued for. The sons resisted the claim on the following grounds, *viz.* (1) that the suit is bad for non-joinder of respondent's brother, (2) that at the date of the former suit, appellants were alive and the suit is therefore barred by S. 43, Civil Procedure Code, (3) that the claim is time-barred, and (4) that the debt in question is not binding upon them. The District Judge gave judgment for respondent with costs and directed that defendants 1, 2, 3 and 4 do pay plaintiff Rs. 1792 (the six past instalments and interest thereon) together with interest at 6 per cent. per annum from date of plaint to date of payment from the property of the family in the hands of the defendants, and ordered further that the defendants do pay the five future instalments on the respective dates on which they fell due with interest at 6 per cent. from those dates from the property in their hands. Against this decree, 1st and 2nd defendants have appealed and they reiterate the grounds of defence in support of their appeal and also urge that the suit is either not maintainable at all or at least in its present form. On the merits, there can be no doubt that appellants are liable to pay their father's debt. Respondent deposed that the debt in dispute was contracted on account of the trade which Chidambarayya carried on and of the cultivation of his lands. Appellants offered no evidence to show that the debt was either illegal or immoral, nor did they allege either that ancestral property came to them by survivorship or that such property as so came was not sufficient to satisfy respondent's claim. The contest in appeal has reference in the main to several preliminary objections urged against the claim and the first of them is the non-joinder of respondent's undivided brother as a co-plaintiff. This formed the subject of the fifth issue and the judge determined it in respondent's favor

observing that no evidence need be brought on that issue. It appears that appellants and respondent's undivided brother asked that the latter should be included in the suit but that their application was refused on the ground that he was not a necessary party. The procedure followed by the judge cannot be reconciled with the policy of S. 32, Civil Procedure Code, as explained in *Vydianada* v. *Sitarama*, I. L. R, 5 M, 52, and with the principle that when the debt sued for is due to a joint Hindu family, the debtor is entitled to insist that all the joint creditors from whom he can claim a discharge ought to be parties to the suit in order that the decree which may be passed therein may effectually discharge him as against all. It appears however that respondent amended the plaint by describing himself as managing co-parcener and representative of the joint family. The omission therefore to make respondent's brother a party to the suit is by reason of the amendment a mere formal error by which appellants cannot be prejudiced.

As regards the 2nd preliminary objection that this suit does not lie, the judge very properly disallowed it for the reasons mentioned in paragraph 14 of his judgment. The right which respondent seeks to enforce is that of the creditor to recover the debt of a deceased Hindu father from his sons to the extent they take ancestral property by survivorship and the ground of action is that by Hindu law it is the pious obligation of the latter to discharge so far as ancestral property permits, the debt which the former died without paying. The present suit is not a suit to enforce the original mortgage because it has merged in the money decree in O. S. No. 5 of 1877. Nor is it a suit to enforce the decree in that suit which can only operate *inter partes*. It is a suit to enforce an obligation imposed by Hindu law on the son to pay upon his father's death his debt in a certain contingency, an obligation which was not adjudicated upon in the previous suit and which can only be enforced by a fresh suit. In *Arunachala* v. *Zamindar of Sivagiri*, I. L. R, 7 M, 328 and *Natasayyan* v. *Ponnusami*, I. L. R, 16 M, 99 this court allowed such obligation to be enforced by a new suit. In *Hanumantha* v. *Hanumayya*, I. L. R, 5 M, 232, the Full Bench observed that to enforce the liability of ancestral property in the hands of sons to satisfy their father's debt, the holder of a money decree must have recourse to a separate suit.

The third preliminary objection is that the question whether ancestral property is liable or not for the father's debt in the

present suit is one which relates to execution of the decree in O. S. No. 5 of 1877 and that the order whereby this attachment was raised was an order made under S. 244, Civil Procedure Code, and that no fresh suit can be brought. This contention is however at variance with the order of this court passed in an appeal preferred under S. 244 on the 21st October 1890. It must also be observed that this order is in accordance with the principle laid down by the Full Bench in *Hanumantha* v. *Hanumayya.* It may also be noted here that under S. 234, Civil Procedure Code, an execution creditor can only proceed against the property of a deceased debtor in the hands of his representatives and *not* against the property of the representative. It is loosely said at times that joint ancestral property in the hands of a son is under the Mitakshara law assets for the payment of the father's debt but it is not so *per se* but assets only when the debt is either admitted to be binding or when in the case of a *bona fide* dispute it is finally adjudicated in a fresh suit to be neither illegal nor immoral.

Another preliminary objection is that the order passed by the judge on the 18th September 1889 and confirmed by the High Court on the 21st October 1890 was an order made under S. 280 of the Code of Civil Procedure and that a declaratory suit is the only one which can be maintained under S. 283 for the purpose of rendering that order inoperative. That was clearly not an order made under S. 280. It purported to be made under S. 244 and there was an appeal to the High Court and the final adjudication there was to the effect that the matter then in controversy was one which ought to be dealt with *not* in execution but in a regular suit.

The fifth preliminary objection is that appellants were in existence before the date of suit 5 of 1877 and that the present suit against them is consequently barred by S. 43 of the Code of Civil Procedure. We are not prepared to attach weight to this objection for two reasons, *viz.,* (1) because the cause of action in the present suit is not the same as in the previous suit, and (2) because we concur in the judge's finding that appellants were born subsequent to the former suit. We adopt the reasons mentioned in paragraph 8 of the Lower Court's judgment.

Two more objections are argued in support of this appeal. It is urged that the plaint asked only for a declaratory decree and

that the judge passed a decree for payment not only of instalments which had accrued due prior to suit but also those which had not then become due. So far as it relates to future instalments, the decree should have been merely declaratory and it was not competent to the judge to direct payment of a debt in respect of which the cause of action had not arisen at the date of suit. The clause in the plaint which prays for a decree declaring that defendants are bound at once to pay Rs. 1,792, the amount of the past six instalments is ambiguous, but it prays also for such relief as the court may deem proper and a direction that the instalments which had become due be paid awards only such as are properly claimable on the facts of the case. However imperfect the wording of the clause may be, there is reason to think that the intention was to claim consequential relief in respect of past instalments. The payment of the full institution fee, the words, "Are bound at once to pay" and the prayer for such other relief as the court may grant, shew that a reasonable construction has been placed on the plaint and that the decree is substantially correct in so far as it relates to past instalments.

The last preliminary objection is that the suit is time-barred. The judge holds that time began to run from the date on which each instalment fell due and that the period of limitation is twelve years under Art. 122, Schedule II of the Act of Limitation. But it is clear that Art. 122 is not applicable, for this is not a suit upon a judgment and under the Code of Civil Procedure no second suit will lie upon a previous judgment, the remedy provided being its execution in the manner therein prescribed. As was observed in *Natasayyan* v. *Ponnusami*, I. L. R, 16 M, 99, it is Art. 120 that governs the suit and the statutory period is six and not twelve years as considered by the judge. According to Art. 120 time begins to run from the date when the right to sue accrues and applying this principle to the case before us, we agree with the judge that the time begins to run from the date on which each instalment becomes due. To this view, appellant's pleader objects first on the ground that the son's obligation to pay the father's debts arose immediately on the father's death, which in this case occurred on the 28th December 1883, whereas the present suit was not brought till the 3rd February 1891. But this objection is not sound inasmuch as the father's obligation was only inchoate at the

date of his death and the words "right to sue" presuppose the existence of an obligation which is no longer inchoate but is perfected and clothed with a right of action. It is not correct to say that the obligor's death perfects all his inchoate obligations which devolve on his heir and renders them enforceable at once without reference to the contract or rule of law which originated them. Suppose that the father executed an instalment bond for Rs. 10,000 payable in 10 yearly instalments and died before the first instalment became due leaving considerable separate property for his son to inherit. May the creditor demand the whole debt saying that the father's death perfected all his inchoate obligations as against the heir? The general principle is that the son succeeds to the father's assets and liabilities as they are at the death of the latter and that the father's death does not alter either the nature or extent of the rights or liabilities transmitted to the son. Why should the case then be otherwise where the obligation attaches to ancestral instead of separate property in the hands of the son? The theory of the son's pious obligation rests on this basis, that the non-payment of a debt is a sin and that so long as it remains unpaid it is a source of torment to the manes of the father which it is the son's duty to relieve against. The object is to afford relief to the father by discharging his debt when it becomes due and not to benefit the creditor by making the debt more onerous against the son than it was against the father. The answer to the question when an obligation ceases to be immature and becomes actionable must depend upon the contract or the rule of law which is its cause, and not upon any new contract to be made by the court for the parties concerned. In the case of a pious obligation devolving on the son under Hindu law when ancestral property survives, the obligation devolves on the son in the condition in which it would be enforceable against the father if he had been still alive. It is no doubt correct to say that the father's debt is binding on the son when ancestral property survives to him upon the father's death, but it is not correct to hold that the debt becomes always payable at once on the fathers' death. In most cases the debt may be, and is, one due at the date of the father's death but cases may arise in which it may fall due some years after that event. It is no doubt stated in the case reported in I. L. R, 16 M, 99 that time runs from the date of the father's death

but it should not be forgotten that in that case the debt was overdue when the father died. We are therefore of opinion that the suit is not time-barred.

The result is that the decree of the judge will be modified by omitting the direction about the payment of future instalments and by substituting for it a declaration that appellants are liable to pay future instalments as they fall due and the decree is confirmed in other respects. The appeal having substantially failed, appellants will pay respondent's costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Chathakelan *alias* Thundu *alias* Edathara Valia Nair ... ... } Appellant (*Petitioner*).*

v.

Govinda Karumiar ... ... Respondent (*Counter-Petr.*).

Civil Procedure Code, S. 234—Execution of decree—Person in possession not "legal representative." Chathakelan *v.* Govinda Karumiar

A decree cannot be enforced in execution against a person who is not the legal representative of a deceased judgment-debtor on the ground that he is in possession of property belonging to the estate of the deceased.

Appeal against the order of the District Judge of South Malabar in Civil Miscellaneous Appeal No. 17 of 1892 confirming the order of the District Munsif of Palghat in Miscellaneous Petitions Nos. 380 and 2325 of 1891.

A decree was obtained against the Edathara Valia Nair for a sum of money. The decree-holder sought to execute it against his successor in *stanom* on the ground that the latter had collected *malikhana* due to his predecessor. The District Munsif allowed execution. On appeal the District Judge confirmed his order although he was of opinion that the present Valiya Nair was not entitled to the *malikhana* due to the estate of the deceased.

The present Valiya Nair preferred this appeal to the High Court.

K. P. Govinda Menon for *C. Sankaran Nair* for appellant.

V. C. Desikachariar for respondent.

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* C. M. S. A. No 51 of 1892. 16th November 1893.

JUDGMENT:—Though the judge says there is authority for holding that the words "legal representative" in S. 234 of the Code of Civil Procedure include any person who has taken possession of the property of the deceased judgment-debtor, he has not cited any such authority. It was held in the case reported in 15 W. R, 476, *Dunput Sing Bahadoor* v. *Ranee Rajessuree*, that property in the possession of others than the legal representative might be taken in execution of a decree; but it was so held with reference to the language of S. 210 of the Code of 1859, which allowed of execution being taken either against the legal representative or *the estate* of the deceased judgment-debtor. But in S. 234 of the present Code the words "against the estate of the deceased debtor" are not to be found, and execution is allowed only against the legal representative and "to the extent of the property of the deceased *which has come to his hands* and has not been duly disposed of."

We do not think that the words, 'legal representative' can be taken to include any person who does not in law represent the estate of the deceased. The wording of S. 234 seems to point to the intention that a stranger in possession of property who was not a party to the decree ought not to be proceeded against in execution or otherwise than by a regular suit.

We must set aside the orders of the courts below with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best

Marimuthu Pillai ... ... Appellant (*Defendant*).*

v.

Krishnasami Chetti and others { Respondents (*2nd, 3rd* and *4th Plaintiffs*).

Marimuthu Pillai *v.* Krishnasami Chetti.

Suit on promissory note by payee—Endorsement invalid—Negotiable Instruments Act XXVI of 1881, S. 46.

Held, that although the property in a promissory note payable to order on demand passes by endorsement and delivery a suit by the endorsee having been dismissed on the ground that the endorsement was invalid, the endorsement must be treated as cancelled and the payee entitled to sue.

Held also, that the payee of a promissory note is entitled to pay an endorsee when the note is dishonored and striking out the endorsement to sue the maker for compensation, and that as the endorsee had been paid after dishonor, the suit upon the note by the payee would lie.

* A. S. No. 25 of 1893. 6th December 1893.

Appeal against the decree of the District Judge of Trichinopoly in Original Suit No. 30 of 1890.

This was a suit on a promissory note payable to order on demand executed in favor of the first plaintiff by the defendant. The 1st plaintiff had endorsed the promissory note to P. Subbayyar who instituted a suit thereupon against the defendant. That suit was dismissed on the ground that P. Subbayyar had paid no consideration for the endorsement and that he was not the proper person to sue upon the note. The plaintiffs thereupon instituted the present suit upon the note. The defendant contended that there was no consideration for the pro-note and that the plaintiffs had no right to sue upon a note which had been endorsed to another. The District Judge held that the note was for consideration, and that the defendant was estopped from contending that the endorsement was valid.

The defendant preferred this appeal to the High Court.

T. Rama Row for appellant.

V. Bhashyam Aiyangar and *C. R. Tiruvenkatachariar* for respondents Nos. 2 and 3.

V. Krishnaswami Aiyar for respondent No. 1.

JUDGMENT :—Two questions arise for decision in this appeal and the first of them is whether the promissory note A was executed for money lent or subject to the agreement set up by the appellant. The finding of the judge is that the note was given for money lent and the contention in appeal is that the judge has refused credit to the evidence adduced by appellant on insufficient grounds.

[Upon the evidence the court held that there was consideration for the note and proceeded as follows.]

The 2nd question is whether property in the promissory note A vested in Lakshmana Chetti at the date of suit so as to enable him to maintain it. The facts so far as they bear on this point are shortly these: Lakshmana Chetti endorsed the promissory note to one Patnam Subbayyar but appellant refused to pay when the note was presented for payment. Thereupon, Subbayyar applied to a Notary Public at Trichinopoly for noting the dishonor and the note was accordingly protested. Thereupon the endorsee sued

the maker in No. 37 of 1888 on the file of the District Court but appellant pleaded the agreement now set up and contended further that the endorsee paid no consideration for the endorsement and, that there was, therefore, no valid transfer of the promissory note. The District Judge upheld his contention and dismissed the suit without entering on the question whether any and what consideration passed from the payee to the maker. On the dismissal of this suit Lakshmana Chetti paid Subbayyar and got back the note but it was not reindorsed in his favor. As appellant's 4th witness Subbayyar states that the note was endorsed to him in part payment of a debt due by Lakshmana Chetti and that when the suit failed Lakshmana Chetti paid him the amount due under it and got back the dishonored note. It is no doubt true as argued by appellant's pleader that the property in a promissory note payable to order on demand passes by endorsement and delivery. So it was held in *Pattat Ambadi Marar* v. *Krishnan,* I. L. R, 11 M, 290 and it is also expressly provided for by S. 46 of Act XXVI of 1881. But in the case before us, the endorsement in favor of Subbayyar was declared by the decree in Original Suit No. 37 of 1888 invalid and must therefore be treated as cancelled. Moreover the payee of a promissory note is entitled to pay an endorsee when the note is dishonored and, striking out the endorsement, to sue the maker for compensation or to reissue the note. See Byles on Bills of Exchange, 14th Edition, page 195. The objection that respondents have not taken out a certificate to collect the debts due to Lakshmana Chetti is not pressed, the certificate being produced before us.

This appeal fails and is dismissed with costs

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Narana Maiya ... ... Appellant (*Deft.*)*

v.

Vasteva Karanta and another ... . . Respondents (*Plffs.*)

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* S A. No. 213 of 1893. 25th October 1893

Hindu law—Personal decree against widow—Purchaser taking life interest—Effect of dismissal of claim petition by reversioner. Narana Maiya v. Vesteva Karanta

Where a merely personal decree was passed against a widow though for a debt binding on the reversioner and there is nothing to show that the decree was intended to operate against the reversioner the purchaser of the property in execution of the decree takes only the widow's life interest.

The dismissal of a claim petition by the reversioner in execution proceedings against the widow cannot affect his reversionary right.

Second Appeal against the decree of the District Judge of South Canara in Appeal Suit No. 236 of 1891 presented against the decree of the District Munsif of Kundapur in Original Suit No. 152 of 1890.

The suit was by the nephew of one Ramappa Karanta as reversioner after the death of his widow in 1888 against the defendant who was an auction-purchaser of the property in execution of a decree obtained against her. The District Munsif held that the debt for which the decree was passed against Ramappa's widow was binding upon her husband's estate and therefore the defendant had a good title to the property. He also referred to a razinamah entered into by Ramappa's widow with the plaintiff's father according to which there was no stipulation that she was to hold it for life though she was interdicted from alienating it without his consent. He also held the plaintiff estopped from questioning the validity of the sale in favor of defendant as a claim petition by the plaintiff objecting to the attachment and sale had been dismissed for default. The Munsif dismissed the suit. The District Judge on appeal held that the decree against Ramappa's widow was only personal whatever the value of the debt and that the defendant took only the widow's life interest by his purchase. He gave the plaintiff a decree.

The defendant preferred a second appeal to the High Court.

C. R. Pattabhirama Aiyar for appellant.

K. P. Madhava Row for respondents.

JUDGMENT :—There is nothing in Exhibit VII to show that the decree was obained against the widow Mahalakshmi as the representative of her husband's estate, nor are we referred to any proceedings in that suit showing that the decree was not a personal one simply.

In the case reported in I. L. R, 10 C, 985, *Jugul Kishore* v. *Jotendro Mohun Tagore,* the decree was passed against the husband. In that reported in 16 W. R, 49, *Bisto Beharee Sahoy* v. *Lalla Byjnath Pershad,* the husband's property was expressly made liable by the decree. Neither of these cases, is, therefore, on all fours with the present one, which is governed by the principle laid down by the Privy Council in *Baijun Doobey* v. *Brij Bhookun Lall Awusti,* L. R, 2 I. A., 275.

The razinamah Exhibit A does not, on its true construction, amount to a gift of an absolute estate to the widow. It merely recognizes the widow's right to possess the property during her life without making alienations.

The dismissal of the claim petition VIII cannot affect the plaintiff's claim as reversioner, a claim which only became enforceable on the widow's death in 1888. Further, the claim was dismissed without enquiry.

It is finally contended that the debt in question was due from the husband, as is also found by the District Munsif and that the District Court was wrong in considering this point immaterial.

This was not the case of a voluntary sale by a widow in discharge of her husband's debt, but of a court sale in execution of a personal decree obtained against the widow. The judge is therefore right.

We dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar, and Mr. Justice Best.

Kandathil Padinhare Veetil Karnavan and Manager Sankunni Nair.	Appellant in No. 779 (2nd *Defendant*).*
v.	
Kizhanalloor Manakkal Narayanan Nambudri's son Narayanan Nambudri and another	Respondents in Do. (*Plff.* and 1*st Defendant*).
Puthiadath Karnavan and Manager Itti Raman alias Kunhunni Nambiar.	Appellant in No. 943 (1st *Defendant*)†
v.	
Kizhanalloor Manakkal Narayanan Nambudri's son Narayanan Nambudri and another.	Respondents in Do (*Plff.* and 2nd *Defendants*).

* S. A. Nos. 779 and †943 of 1892. 4th October 1893.

Sankunni Nair v. Narayanan Nambudri

Civil Procedure Code, S. 317—Certified purchaser agent of judgment-debtor—Suit to recover property.

Where in execution of a decree against the plaintiff's predecessor in interest the jenm right in certain properties was purchased by his agent on account of his principal and such agent became the certified purchaser, *held*, that a suit by the plaintiff against the heir of the certified purchaser is not barred by S 317 of the Code of Civil Procedure.

Held, however, that the properties were subject to a charge in favor of the heir of the certified purchaser for the amount of the purchase-money found to have been paid by him out of his funds with interest thereon at 6 per cent. up to the date of payment.

Obiter dictum:—Section 317 of Act X of 1877 has not altered in principle the rule of law in S 260 of Act VIII of 1859.

Per Muthusami Aiyar, J:—The protection given to a certified purchaser under S. 317 does not extend to cases of fraud.

Per Best, J:—The judgment-debtor is not entitled to recover property from the certified purchaser on the mere ground that he is a *benamidar*, or that to allow him to keep the property would be to allow a fraud to be perpetrated.

Second Appeals against the decrees of the Subordinate Judge of South Malabar at Calicut in Appeal Suits Nos. 1064 and 1065 of 1890, confirming the decree of the District Munsif of Nedunganad in Original Suit No. 339 of 1889.

The facts of this case appear sufficiently from the following judgments.

In S. A. No. 779 *of* 1892.

P. R. Sundara Aiyar for appellant.

K. P. Govinda Menon for respondent No. 1.

In S. A. No. 943 of 1892.

C. Sankara Nair for appellant.

V. Bhashyam Aiyangar for respondent No. 1.

JUDGMENTS :—*Best, J.*—These two appeals are against the same decree—the appellant in No. 779 being the 2nd defendant, and appellant in No. 943 the 1st defendant.

The suit was brought by the plaintiff for possession of two items of land alleged to be the jenm property of plaintiff's house and demised by plaintiff's ancestor on kanom for Rupees 412-9-2 to a former karnavan of defendants 2 to 15 in Kollam 1040 (1864-5). Plaintiff's case is that, on the land being sold (in 1874) in execution of decree in O. S. 232 of 1868 obtained against plaintiff's father, it was purchased by 1st defendant's late karnavan Raman Nambiar *benami* for plaintiff's mana (house), the said Raman Nambiar

having been appointed by plaintiff's mother, manager of plaintiff's mana—plaintiff being an infant aged two years in 1048 (1872-3) when his father died; that Raman Nambiar continued as such manager till 1054 (1878-9) when 1st defendant was appointed as his successor and is still the kariastan; that in 1064 (1888-9) when the kanom was renewed to 2nd defendant at the advice of the 1st defendant, the plaint items were fraudulently excluded. Hence this suit.

The 1st defendant denied that either his karnavan or himself ever managed on behalf of plaintiff's mana, and pleaded that the purchase in 1874 was made by his karnavan with his own money and on account of his own tarwad and not *benami* for plaintiff; that the suit was opposed to Ss. 30 and 317 of the Code of Civil Procedure and also bad for misjoinder of causes of action; further, that it was time-barred and that plaintiff attained his majority more than three years before the institution of the suit.

Defendants 2 to 5 supported 1st defendant, and the other defendants allowed the suit to proceed *ex parte* as far as they were concerned.

The two Lower Courts have concurred in finding that at the date of the purchase of the plaint property, 1st defendant's karnavan was managing on behalf of plaintiff's mana; that he did in fact purchase the property for the plaintiff's illom—though the money paid was 1st defendant's karnavan's own; that there was no adverse possession till January 1889 when plaintiff granted the renewal kanom and 1st defendant executed the kanom deed XXIII, shortly after, for the plaint lands; also, that the suit is brought within three years of plaintiff's attainment of majority, and that the cause of action did not arise till January 1889. It has further been found that the suit is not bad either for misjoinder of causes of action or under section 30 of the Code of Civil Procedure.

The principal contention before this court is that the suit is bad as being opposed to S. 317 of the Code of Civil Procedure, which declares that "no suit shall be maintained against the certified purchaser (at a court sale) on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims."

The District Munsif held the above section to be no bar to the suit because "the auction was held and the sale certificate

granted before the new Act (X of 1877) came into force and the provisions of S. 317 apply to a certified purchaser under the Act." But as well observed by *Mahmood, J.*, in *Aldwell* v. *Ilahi Bakhsh*, I. L. R, 5 A, 478—at p. 481—Section 317 of the present Civil Procedure Code has not altered in principle the rule of law contained in S. 260 of the old Code (VIII of 1859). The Subordinate Judge's reason for holding this suit not to fall within the prohibition contained in S. 317 is because it was held in *Sohun Lall* v. *Lala Gya Pershad*, 6 N. W. P. H. C. R., 265 that S. 260 of Act VIII of 1859 did not preclude a suit by a decree-holder against the certified purchaser for the purpose of establishing his right to bring the property to sale in execution as the property of the judgment-debtor, and "if so" (says the subordinate Judge) "I do not see why the judgment-debtor himself cannot bring a suit for a declaration that the property was purchased by his agent *benami* for himself." I imagine, however, that it is this latter case that the legislature had expressly in view in enacting S. 317. As observed by the *Chief Justice* and *Handley, J.*, in *Rama Kurup* v. *Sridevi* which is reported in I. L. R, 16 M, 290, "the object of the section is to put a stop to *benami* purchases at execution sales, and this object can only be carried out by enforcing it in all cases without regard to consequences." As further observed in the same judgment, "It is not a sufficient reason for declining to carry out the express terms of the section, that to do so would be to allow a fraud to be perpetrated. The person in whose name a purchase has been made for the benefit, and with the money, of another, of course commits a fraud in claiming the property as his own. Nevertheless, the law says that a suit shall not be maintained against him on the ground that the purchase was *benami* and thus provides that his fraud shall prevail." As was also remarked in *Ramakrishnappa* v. *Adinarayana*, I. L. R, 8 M, 511—at p. 515—"the effect of S. 317 can only be taken to be to enable certified purchasers and those claiming under them to avoid any arrangement made with them in regard to the purchase in the nature of a trust."

The present, however, is not a case of *benamidar* pure and simple. It is found that Raman Nambiar was, at the time of the purchase, manager on behalf of plaintiff who was an infant,

and that other would-be purchasers of the property abstained from bidding because they were given to understand that the purchase by Raman Nambiar was being made by him as such manager and on behalf of the minor. Consequently, property worth Rupees 2,000 was allowed to be knocked down for Rupees 230. Moreover, Raman Nambiar never set up any claim to the property as his own. Such being the case, I do not think the 1st defendant can be allowed to succeed in his attempt to secure the property for himself under colour of S. 317 of the Code of Civil Procedure.

But 1st defendant is entitled to interest on the Rupees 230 decreed to him from 25th July 1874, the date of sale (see Exh. XX). The lower courts' decrees will, therefore, be modified by directing plaintiff to pay to 1st defendant interest at 6 per cent. per annum from 25th July 1874 to date of payment on the Rupees 230 decreed to 1st defendant. Plaintiff and 1st defendant will pay each other costs of the appeal proportionate to the amount allowed and disallowed.

Second defendant's appeal No. 779 is dismissed with costs.

Muthusami Aiyar, J.—I come to the same conclusion. The question for determination in these second appeals is whether upon the facts found, the decision of the courts below is correct. The substantial parties to this suit are the son of the execution-debtor in Original Suit No. 232 of 1868 and the representative of the certified purchaser at the court sale held in execution of the decree passed therein. It is provided by S. 317, Civil Procedure Code, that no suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or of some one through whom such other person claims. Although Act VIII of 1859 was in force when the sale took place in the present case, S. 317 has not, as observed in *Aldwell* v. *Ilahi Bakhsh,* I. L. R, 5 A, 481, altered in principle the rule of law contained in S. 260 of Act VIII of 1859. The rule is, *not* that a *benami* purchase is void altogether, but that it shall not be available as a ground of action against a certified purchaser. The Privy Council held in *Lokhee Narain Roy Chowdhry* v. *Kalypuddo Bandopadhya and Shamapuddo Bandopadhya,* L. R., 2 I. A, 154, that when the certified purchaser is the plaintiff, the real owner, if in possession, and if he honestly obtained that possession, may rely on the *benami* purchase as a ground of defence. It was also

pointed out by this court in *Ramakrishnappa* v. *Adinarayana*, I. L. R, 8 M., 515 that a *benami* purchase is not invalid even as a ground of claim, as against defendants who are neither certified purchasers nor claim under them. Another limitation of the rule is that indicated by the second paragraph of S. 317, *viz.*, that the protection vouchsafed to a certified purchaser does not extend to cases of fraud. The suit from which these second appeals arise was brought against the anandravan of the certified purchaser, and the ground on which the courts below rest their decision is that the plaintiff is the beneficial owner and that the certified purchaser under whom the 1st defendant claims is *benami* purchaser or his trustee. This ground of decision is inconsistent with the effect of S. 317 which is described in I. L. R, 8 M, 515, as enabling the person claiming under the certified purchaser to avoid any arrangement made regarding the *benami* purchase. If the facts found disclosed a *benami* purchase and nothing more, the appeals must prevail. But it is also found that Raman Nambiar was, at the time of the court sale, managing the affairs of respondent's illom as its agent and that he bought the land as such, though he advanced the purchase money on the understanding that he was to be repaid. It is also found as a fact that the market value of the land in dispute was Rupees 2,000, whilst it was bought at the court sale for Rupees 230. The District Munsif observes that there is strong evidence to show that numerous persons, who went to bid at the court sale, were dissuaded from doing so by Raman Nambiar, who represented to them that he was buying the land for the use of Respondent's illom. It is also found that Raman Nambiar continued to be the agent of the illom till his death, and that after him, the 1st defendant was agent until the date of the controversy which resulted in this litigation. Until 1889, the kanom originally granted by the illom was outstanding and it does not appear that Raman Nambiar ever asserted his title to the land in dispute or that the 1st defendant asserted the right of his tarwad to it prior to 1889. Under these circumstances, I consider that the decision of the courts below can be supported on the ground that Raman Nambiar bought the land as agent of plaintiff's illom subject to a charge in his favor for the amount advanced by him, and that until 1889, the land was treated as the property of the illom; otherwise, an agent would be enabled to make a profit out of his principal's property, which he

intended to deal with as agent and continued to do so till 1889, and thereby to turn the understanding on which his name was inserted in the certificate and the land was since held, into a means of perpetrating fraud on his principal. I also think that interest should be awarded on Rupees 230 in the decree proposed.

I concur with my learned colleague on the other questions raised in second appeal and in the decree proposed by him.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, Kt. Chief Justice and Mr. Justice Shephard.

P. T. Krishnaswami Chetti ... ... Appellant (*Plff*).*

v.

The Natal Emigration Board carrying on business by its Agents, Messrs. Parry and Co. of Madras. } Respondents (*Defts*).

Krishnaswami Chetti v. The Natal Emigration Board.

Transfer of Property Act IV of 1882, S. 114—Payment into court—Relief against forfeiture—Presidency] Small Cause Courts Act IX of 1887, S. 22—Costs between attorney and client.

Held, that a lessee is entitled to be relieved against a forfeiture clause in the lease, where in a suit for the recovery of property by the lessor as upon a forfeiture the lessee pays into court the arrears of rent with interests and costs, and that the further conduct of the suit after the payment is at the risk of the plaintiff.

An application under Ch. VII of the Presidency Small Cause Courts Act is not a suit within the meaning of S. 22 of the Act, and the High Court cannot award costs as between attorney and client for the plaintiff's failure to apply for ejectment in the Presidency Small Cause Court.

Appeal from the decree of the High Court of Judicature in the exercise of its ordinary original civil jurisdiction made in Civil Suit No. 242 of 1892.

The plaintiff sued as the lessor of certain premises for their recovery alleging a forfeiture by reason of default in payment of rent and relied upon an express condition in the lease "that if and whenever any part of the rent thereby reserved shall have been in arrear for a specified time, whether legally demanded or not, the lessors, their representatives and assigns may re-enter upon any

* A. S. No. 8 of 1893, 22nd August 1893.

part of the said premises and there-upon this demise shall be absolutely determined." The lease was perpetual and the lessees were to hold possession from the 15th of September 1887. Rent was paid up to the period ending about the 15th of March 1892 and default was made in payment of rent for the subsequent month until the 10th of May. The defendant tendered the amount of rent due on the 10th and 13th of May with interest and costs. But the plaintiff sued for the recovery of the premises.

This case came on for hearing before *Wilkinson, J.* who held that there was no default within the meaning of the forfeiture clause as the rent was only payable on the 1st of each succeeding month, although rents were paid on the expiry of each period on the 15th of the month, and dismissed the plaintiff's suit with costs as between attorney and client as a suit should have been instituted in the Small Cause Court.

The plaintiff preferred an appeal to the High Court.

P V. Krishnaswami Chetti for appellant,

W. Grant (with *Messrs. Wilson* and *King*) for respondents.

JUDGMENT :—It appears that on the 13th May 1892 there was a valid tender of rent, interest and costs and that on 3rd November there was a payment into court of the full amount due up to the 15th November. This being so, the defendants have brought themselves within the terms of S. 114 of the Transfer of Property Act. After the tender on the 13th May the plaintiff proceeded with the suit at his risk. The only other question is as to costs between attorney and client given by the learned judge. In our opinion this suit was not cognizable by the Small Cause Court and therefore S. 22 of the Act does not apply, An application under Chapter VII is not a suit within the meaning of S. 22.

We must vary the decree accordingly. Each party will bear his own costs of this appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Subba Row ... ... Appellant (*Petitioner*).*

v

Palaniandi Pillai ... ... Respondent (*Counter-petr*).

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* C. M. S. A. No. 5 of 1893. 12th October 1893.

Subba Row. v Palaniandi Pillai.

Succession Certificate Act VII of 1889, Ss. 19,26—Second appeal.

Where an application for a succession certificate is disposed of by a Subordinate Court and the appeal decided by the District Court, there is no provision for a second appeal to the High Court.

Appeal against the decree of the District Judge of South Malabar at Calicut in Civil Miscellaneous Appeal No. 63 of 1892 confirming the order of the Subordinate Judge of South Malabar at Palghat in Civil Miscellaneous Petition No. 7 of 1892.

This was an application for a succession certificate to the Subordinate Court of Palghat. The Subordinate Judge rejected the petition on the ground the heirship was not proved. On appeal the District Judge confirmed his decision.

The petitioner preferred a second appeal to the High Court.

P. R. Sundara Aiyar for appellant.

K. P. Krishna Menon for respondent.

JUDGMENT.—The preliminary objection is taken that no second appeal lies. The language of S. 26 appears to us to support the contention. The intention was, we think, to confer on the District Court the same appellate jurisdiction over an order of an inferior court as is conferred by S. 19 on the High Court over the order of a District Court.

There is no provision in the Act for a second appeal in any case. Both S. 19 and S. 26 declare that the orders of District Courts shall be final.

The material words in S. 19, Cl. 3, are "subject to the provisions of Sub-Section 1 and of Chapters XLVI and XLVII of the Code of Civil Procedure as applied by S. 647 of that Code an order of the District Court under this section shall be final." Section 269, Cl. 3, is to the same effect, but the words "subject to the other provisions of this Act" are omitted.

It is contended that the word 'final' is intended to preclude any other suit. This may be. But we are of opinion that it also precludes a further appeal except when such is expressly allowed. The use of the words "subject to the other provisions of this Act" in S. 19 and their omission in S. 26 is significant.

We are of opinion that the preliminary objection must prevail.

This appeal is therefore dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Sreenivasa Thathachar, and others... Appellants (*Defendants*).*

v.

Trichengod Pykist Rama Aiyan and another. } Respts. (*Plff.* & 85th *Deft*).

Sreenivasa Thathachar v. Rama Aiyan.

Mortgage decree—Sale in execution—Charge in favor of decree-holder for subsequent arrears of revenue paid—Liability of property sold for fresh charge.

An agraharam which consisted of several shares belonged to a number of agraharamdars and was registered in the name of them. Plaintiff as the mortgagee of 38 out of 51 shares from some of the agraharamdars obtained a decree on the mortgage. Before the sale, plaintiff paid the arrears of revenue that accrued subsequently and afterwards sold the shares in execution of the mortgage decree. He now sued for the recovery of the amount of revenue paid by him with interest from the whole of the agraharamdars and the entire 51 shares:

Held, (1) that the plaintiff was entitled to a decree against the unregistered as well as the registered proprietors; (2) that the 38 pangus having been sold subject to the charge in plaintiff's favor, he was entitled to a decree against them also; (3) that the plaintiff was entitled to a joint and several decree against all the agraharamdars.

Appeal against the decree of the District Judge of Salem in Original Suit No. 9 of 1890.

The facts of this case appear sufficiently from the following judgment.

C. R. Pattabhirama Aiyar for appellant.

K. P. Govinda Menon for *V. Bhashyan Aiyangar* for respondant No. 2.

M. O. Parthasarudhi Aiyangar and *C R. Tiruvenkatachariar*, for respondent No. 1.

JUDGMENTS :—*Best, J*:—The following are the facts of the case;—The plaintiff (now respondent) was assignee of the mortgage of 38¼th out of 51¼th pangus of the agraharam of Byrojee effected by some of the pangudars on 8th January 1881 for a sum of Rs. 8,245-7-5 borrowed to pay off the assessment &c. due on the whole agraharam. As such assignee, plaintiff brought a suit (Original Suit No. 2 of 1884) against the executants of the mortgage and obtained a decree on 22nd June 1885 (Exhibit H.) While the

* A. S. No. 151 of 1891. 7th September 1893.

above suit was pending the agraharam was again advertised for sale for arrears of revenue &c. which plaintiff paid off and instituted Original Suit No. 2 of 1886 for recovery of the amount so paid and obtained a decree for the same with interest on 27th August 1888 (Exhibit M). While Original Suit No. 2 of 1886 was pending, arrears accrued for subsequent Faslies, and to prevent the sale of the properties for such arrears plaintiff paid a sum of Rs. 3,618-2-7 on the 13th April 1887 and a further sum of Rs. 1707-7-0 on the 4th May 1888, Exhibits A and B. In execution of the decree in Original Suit No. 2 of 1884 the $38\frac{1}{8}$th pangus were sold on 24th September 1888 when 85th defendant purchased the same for Rs. 11,000, as is evidenced by the certificate filed as Exhibit AA.

The suit out of which the present appeal has arisen was instituted by plaintiff (in 1890) to recover from the entire agraharamdars from defendants Nos. 1 to 84 personally the amounts paid under Exhibits A and B, with interest, costs and further interest.

The District Judge has found some of the defendants to have no interest in the agraharam and therefore to be not liable but against the rest, except the 85th defendant, he has given a personal decree. He has also exempted from liability for the debt the $38\frac{1}{8}$th pangus purchased by 85th defendant at the sale in execution of the decree in Original Suit No. 2 of 1884, but has made the debt a charge on the remaining 13 pangus. Hence this appeal by defendants Nos. 1, 4, 5, 16, 17, 58 to 62, 66, 69, 74, 78, and 81.

The first objection urged on behalf of the appellants is that in purchasing the $38\frac{1}{8}$th pangus at the sale in execution of the decree in Original Suit No. 2 of 1884, 85th defendant was merely a *benamidar* for the plaintiff and that, the latter being the real purchaser, the charge is extinguished under S. 101 of the Transfer of Property Act. On the issue whether plaintiff was the real purchaser of the $38\frac{1}{8}$th shares, the District Judge's finding is that though there are reasonable grounds for the defendants' suspecting such to be the case, they have failed to prove it. Such also is our finding after a careful consideration of the evidence on both sides. It is therefore unnecessary to consider the question raised with reference to S. 101 of the Transfer of Property Act.

Other contentions on behalf of appellants are (1) that none but registered holders of shares in the Agraharam can be held personally liable for the claim of the plaintiffs, and (2) that the District Judge has erred in exonerating from such liability the 85th defendant and the 38⅛th shares of the village purchased in his name.

The District Judge's finding is that the 38⅛th shares were sold subject to these encumbrances, but that nevertheless the shares must be held to be not liable for the same. His reasons for this finding are as follows :—A payment made by a mortgagee or other incumbrancer to save lands from sale for arrears of assessment is declared by S. 35 of Act II of 1864 (Madras) to be a charge upon the land which should " only take priority over other charges according to the date at which the payment was made ;" plaintiff is therefore *qua* such payment in the position of a mortgagoe and the decision in *Shaik Abdulla Saiba* v. *Haji Abdulla,* I. L. R, 5 B, 13 is authority for the position that what is sold by the court in such cases is the right, title and interest of the mortgagor as it stood at the date of the mortgage, and such being the case it cannot be affected by the statement in the sale proclamation the the auction sale was subject to such incumbrances. It is difficult to follow the judge's reasoning. It being found as a fact that the 38⅛th shares were sold subject to the charge, there seems no reason why the purchaser at such sale should be allowed to hold the same free of the charge. As the arrears were due on these 38⅛th shares as well, there is no reason whatever for exonerating them from liability for a proportionate share of the charge in any case.

As to the contention that only registered owners can be treated as defaulters within the meaning of S. 25 of the Revenue Recovery Act and consequently the Lower Court's decree is bad in so far as it makes defendants who aro not registered holders also liable for the money due to plaintiff, the answer is to be found in *Seshagiri* v. *Pichu,* I. L. R, 11 M, 457. As there pointed out, the right which the Government has to proceed against the registered proprietor in no way alters the liability of the real owner or of his holding for the arrears of revenue. Registered holders and their property are declared liable at the option of Government in order that Government may not be hampered in the collection of revenue by being compelled to hold complicated enquiries as to real

ownership. But nevertheless the revenue is a debt due from the real defaulter and a charge on the holding.

The remaining question is whether the decree is correct in so far as it makes the defaulters jointly and severally liable. As the entire holding was liable for the revenue to Government, it must, I think, be held to be similarly liable to the plaintiff who has by payment of the arrears acquired a charge upon the land under the provisions of S. 35 of the Revenue Recovery Act.

As to the liability of defendants Nos. 58 to 60 (appellants Nos. 6 to 8) no issue appears to have been asked for in the Lower Court. The result is that the 85th defendant as also 38⅛th shares purchased by him must be held liable for the remaining shares and the other defendants. The lower court's decree will be modified accordingly.

The appellants must pay the 1st respondent's (plaintiff's) costs of this appeal. They are entitled to their costs on the 38⅛th shares from 2nd respondent (85th defendant) and must themselves bear the rest of their costs.

As to the memo of objections I find the judge has given no reasons for disallowing interest subsequent to the date of the suit.

I am of opinion that plaintiff is entitled to interest at 12 p. c. per annum till the date of decree, and at 6 p. c. per annum from that date to date of payment on the amount decreed including costs.

The decree will be further modified accordingly.

Muthusami Aiyar, J:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Kovvuri Basivi Reddi ... ... Appellant (*Plff.*)*

v.

Poosarla Peda Tammanna and others ... ... Respondents (*Defts*).

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* A. S. No. 182 of 1891. 16th October 1893.

Basivi Reddi
v.
Tamanna

Promissory note—Partnership—Suit against non-executant partners.

Where a promissory note is signed by a partner of a firm but he does not sign the name of the firm or describe himself as a mere agent of the firm or the other partners, no suit can be maintained upon the promissory note against the partners who have not joined in the execution of the promissory note, even though the promissory note is given for partnership purposes. In such cases a suit may be maintained against the partnership upon the consideration for the promissory note.

Apeal against the decree of the Subordinate Judge of Cocanada in Original Suit No. 25 of 1889.

The facts of this case are sufficiently stated for the purposes of this report in the following judgment of the High Court.

R. B. Michell and *R. Sriramulu Sastri* for appellant.

The Advocate General *(J. H. Spring Branson)* for respondents Nos. 2, 4 and 6.

JUDGMENT:—This was a suit brought by the appellant upon a promissory note, Exhibit CC, which 12th respondent executed in his favor for Rupees 8094 and annas 2 on the 17th June 1889. The promissory note recites that the amount was due for the price of 13 heaps of salt, which appellant had engaged to deliver to 12th respondent. Respondents are merchants who traded in salt in 1887, 1888 and 1889 at Bimlipatam under the style of P. P. Tammanna, Chilaka Sanyasi Nayadu and Co., and they had a branch establishment at Cocanada where 12th respondent carried on business as their agent and managing partner. On the 18th April 1887 appellant agreed to sell and 12th respondent to buy for three years such salt as the former might supply under the agreement SS. Appellant's case was that the 13 heaps of salt now in dispute were sold and delivered by him to 12th respondent as the agent or managing partner at Cocanada of the other respondents, that the promissory note sued on was executed for its price and that all the respondents were liable to pay it.

The 12th respondent admitted the claim and the Subordinate Judge passed a decree against him. No appeal has been preferred from this part of his decision. Respondents Nos. 7, 9, 10 and 11 adjusted the claim against them by compromise during the progress of the suit in the court below and whilst dealing with this appeal the question of their liability may be dismissed from further consideration.

The 1st, 2nd, 3rd, 5th, 6th and 8th respondents denied the partnership and the sale and alleged that the sale, if any, was for the individual use of 12th respondent who also carried on business at Cocanada on his own account and for his own benefit. They further contended that the suit was the result of collusion between appellant and 12th respondent.

[Their Lordships examined the evidence as to the existence of a partnership among the respondents, and finding that the partnership had been proved, proceeded as follows:—]

Another question in the case was whether all the respondents can be made liable on the promissory note CC. Assuming that it was made and accepted *boná fide* and that salt was supplied by appellant and received by 12th respondent as alleged, we agree with the Subordinate Judge that appellant is not entitled to claim upon it a decree against all the respondents. As already observed, 12th respondent signed his own name on the promissory note CC and did neither sign the name of the firm nor describe himself as a mere agent. It is a settled rule of law that on the one hand, the agent is liable as principal where he does not sign a promissory note as mere agent, whilst on the other, his other partners are not liable to appellant unless the name of the firm is signed. The fact that the promissory note is made for partnership purposes will not render the partnership liable to be sued on it and it was so held by the Court of Chancery, *In re Adansonia Fibre Co.*, L. R, 9 Ch App., 643. *Lord Justice James* lays down the law on this point in these terms:—"Now it is the law of this country and it has alway been the law of this country, that nobody is liable upon a bill of exchange unless his name, or the name of some partnership or body of persons, of which he is one, appears either on the face or on the back of the bill. That is the clear law of this country. It was decided in *Nicholson v. Ricketts*, 2 E & E, 497, if authority be required for such a proposition, that an association which is absolutely without a name has no name by which it can draw, accept, or indorse bills of exchange. It was suggested, and the argument appears to have prevailed with the Vice Chancellor, that where the members of such an association, or the firms constituting such an association for the purposes of that association, draw or accept bill in their individual names or in the names of their partnerships, that for that purpose,

and for the purpose of doing equity, or of reaching the real principal, it might be assumed that the name of the partner upon the bill, or the name of the partnership upon the bill, might be considered as being *pro hac vice* the name of the association. That, in my opinion, is a mere *fictio juris;* and although it used to be said *in fictione juris consistit æquitas,* I think that in these prosaic days, and in the old age of the court, we do not indulge in those flights of imagination which our predecessors did." It is not, therefore, possible to hold in the present case that 12th respondent's name on the promissory note CC represents the partnership whose name is not on it and that a suit can be founded upon it against all the other members of the firm.

Such being the case, the next question is whether the suit can be sustained against the partnership upon the consideration for the promissory note. Were it necessary upon the facts found by the Subordinate Judge to decide this question for the purposes of this appeal, we should hold that the frame of the plaint was such as might admit of the present suit against the partnership being treated as a suit upon the consideration. The plaint prays for a decree against all the respondents and refers to both the promissory note and the sale and delivery of 13 heaps of salt as grounds of claim. At the first hearing, issues were framed as regards both and evidence has been adduced with reference to both. The substantial question is whether the promissory note was executed and the 13 heaps of salt were delivered for partnership purposes.

[Their lordships then dealt with other questions arising in the case and dismissed the appeal with costs.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Padinhathri Narayanan Nambudri and others. } Applts. (*Plffs.* and 1st *Plff's.* representative).*

v.

Padinhathri Damodaran Nambudri and others. } Respts. (*Defts.* 1 & 3 to 5 & 7 & 8 & 6th *Deft's.* heir).

* S. A. No. 1872 of 1891. 23rd October 1893.

Narayanan Nambudri v. Damodaran Nambudri.

Revenue Recovery Act II of 1864, S. 59—Suit to set aside revenue sale for fraud—Limitation—Limitation Act XV of 1877, S. 8.

A suit to set aside a revenue sale under Act II of 1864 on the ground that there was no notice as provided by the Act and that there was fraud on the part of the Village Munsif who bought part of the property cannot be instituted more than six months after the cause of action arose.

Nilankandan v. *Thandamma*, I.L.R, 9 M, 460 distinguished; *Venkata* v. *Chengadu*, I. L. R, 12 M, 168 followed.

Where one of several persons jointly interested in setting aside a sale is a minor, S. 8 of the Limitation Act does not operate to delay the commencement of the period of Limitation.

Seshan v. *Rajagopala*, I. L. R, 13 M, 236, and *Vigneswara* v. *Bapayya*, I. L. R, 16 M, 436 followed.

Second Appeal against the decree of the Subordinate Judge of South Malabar at Calicut in Appeal Suit No. 513 of 1890, confirming the decree of the District Munsif of Betutnad in Original Suit No. 367 of 1889.

This was a suit to set aside the revenue sale under Act II of 1864 on the ground of fraud and to recover possession from the purchaser alleged to have been a party to the fraud. The 2nd plaintiff was a minor. The District Munsif dismissed the suit as being barred by limitation having been instituted more than six months after plaintiffs became aware of the fraud. On appeal the Subordinate Judge confirmed his decision.

The plaintiffs preferred a second appeal to the High Court.

S. Subramaniem and *P. R. Sundara Aiyar* for appellants.

K. P. Govinda Menon for respondent No. 6.

This case came on for hearing before *Shephard* and *Best, J. J*, on the 10th. February 1893, who made the following order:—

ORDER:—"The Subordinate Judge has not considered the question whether the sale was notified as required by the Act which was the fourth ground of appeal before him. The District Munsif considered this point and found on it in favor of the defendants.

We must ask the Subordinate Judge to submit a finding on this issue within one month from date of receipt of this order; and seven days will be allowed for filing objections after the finding has been posted up in this court."

In compliance with the above order, the Subordinate Judge submitted his finding to the effect that the sale was not notified as required by the Act.

This case again came on for final hearing on the 17th September 1893 and on the 23rd October the court (*Muthusami Aiyar* and *Best, J. J.*) delivered the following judgments.

JUDGMENTS :—*Muthusami Aiyar, J:*—This was a suit to set aside a revenue sale held under Act II of 1864. The sale was held in June 1888 and this suit was brought on the 12th August 1889. It is found that at the date of sale there were arrears of revenue due to the Government to the extent of Rs. 54-1-7 and it is clear that the Collector had jurisdiction to sell the land under Act II of 1864. It is found, however, by the Lower Appellate Court that the sale was not duly notified as required by the Act and to this extent the procedure followed by the Collector was irregular. Both the lower courts find that the 7th defendant purchased the land *benami* for the 8th and 9th defendants of whom the former is the Adhikari of the Amsom wherein the land brought to sale is situated. Appellants imputed fraud to the Adhikari but the courts below have negatived it. It is further found that appellants were aware of the sale and its confirmation more than six months before suit. The question for decision in this appeal is whether upon the foregoing facts the courts below were correct in holding that the sale was a proceeding within the meaning of S. 59 of Act II of 1864 and that the suit was therefore barred by limitation. The contention in second appeal is that the sale though valid as between the Collector and appellants, is not so as between the latter and the purchaser on the ground of fraud. The decision of the lower courts is in accordance with the principles laid down in *Nilakandan v. Thandamma,* I. L. R, 9 M, 460 and in *Venkata v. Chengadu,* I. L. R, 12 M, 168. The decision in the last mentioned case is that of four judges who held that the revenue sale in that case, however irregular it was, was a proceeding under the Act for purposes of limitation as the Collector had jurisdiction to sell. It was also pointed out in that case that the decision in I. L. R, 9 M, 460 proceeded on the ground that there were really no arrear of revenue and that the sale was really without jurisdiction. Both decisions recognize the general principle that a revenue sale is a

statutory sale and that when there are arrears of revenue so as to give jurisdiction to the Collector to sell, the sale, however irregular, must be treated as a proceeding under the Act. I am unable to reconcile the contention of appellants' pleader with the principle that statutory sales depend for their validity upon the pre-requisites prescribed by the statute and not on matters which lie outside its purview. I would decline to order any further enquiry whether the price realized was adequate and whether any substantial injury resulted from the sale not having been duly notified, and dismiss the second appeal on the ground that the sale in this case was a proceeding under S. 59 of Act II of 1864 and that the suit is time-barred.

Best, J:—The finding on the issue sent for trial is that the sale was not notified as required by Act II of 1864. This is a finding of fact which we must accept. It is contended, however, on behalf of respondents that the suit is time-barred by S. 59 of the Act. The mere fact of 2nd plaintiff being a minor is not sufficient to save the limitation bar when the alleged fraud came to the knowledge of others jointly interested with the minor more than six months prior to the institution of the suit; for, as observed in *Seshan* v. *Rajagopala*, I. L. R, 13 M, 236, S. 8 of the Limitation Act is inapplicable, the object of that section being the same as that of the corresponding S. 4 of the English Act, 3 and 4 William IV, Chapter 42, which as remarked by *Lord Kenyon, C. J.*, in *Perry v. Jackson*, 4 T. R, 516 at p. 519, "was introduced into the statute in order to protect the interests of those persons which there was no one of competent age, competent understanding, or competent in point of residence in the country to protect," see also *Vigneswara* v. *Bapayya*, Second Appeal No. 335 of 1892 which is to be found reported in the Madras Law Journal Reports, Vol. III, page 216, and I. L. R, 16 M, 436. As was held in *Venkata v. Chengadu*, I. L. R, 12 M, 168 the period of limitation for a suit such as the present is six months from the date on which the fraud was discovered, and as the present suit was brought more than six months after the alleged fraud came to the knowledge of plaintiff's father and also of 1st plaintiff himself, it is clearly time-barred.

The appeal fails therefore and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Queen Empress.*
v.
Mannatha Achari.

Queen Empress v. Mannatha Achari.

Criminal Procedure Code, S. 488—Husband's adultery—Wife's refusal to live—Offer to maintain.

The term " adultery " in S. 488 of the Criminal Procedure Code must be understood in the sense given to it in S. 497 of the Indian Penal Code.

A wife is not entitled to refuse to live with her husband and claim maintenance merely because the husband keeps a concubine.

The husband's offer to maintain, which disentitles the wife to claim separate maintenance, must be an offer to maintain with the consideration due to her position as wife.

Per Muthuswami Aiyar, J:—The husband's immorality which does not amount to adultery or involve the degradation of a married woman being brought into the society of a concubine is no sufficient ground for the wife's refusal to live with her husband.

Case referred for the orders of the High Court, under S. 438 of the Criminal Procedure Code by the Acting District Magistrate of South Arcot in his letter, dated 26th September 1893.

The case was referred as follows:—

" One Pachai Ammal of Velindoor, Villupuram Taluk, put in a petition against her husband on 14th August 1893 under S. 488, Criminal Procedure Code, claiming maintenance for herself and a male child. The petitioner's husband is a mirasi blacksmith and keeps a concubine who is living with him for the last ten years. The husband does not refuse to maintain his wife; but the petitioner refuses to live with him as her husband keeps a concubine. The Joint Magistrate ordered the husband to pay Rs. 4 a month to petitioner under S. 488, Criminal Procedure Code.

" In Criminal Revision Case No. 547 of 1884, quoted in Weir's Digest, it was held that in such a case the wife will not be entitled to maintenance, if she is treated with the condition due to her position, a point on which the Joint Magistrate did not give a finding. The Joint Magistrate says that keeping a concubine is " living in adultery " and that his order is therefore legal under the proviso to that section.

* Crl. Rev. Case No. 499 of 1893. 27th October 1893.

"I should not refer the case had not another Magistrate, not long ago, refused maintenance acting under the direction of the High Court as given in the case referred to. Personally I agree with the Joint Magistrate. But the order of the High Court if followed in one case should be followed in another, and, if the decision of 1884 is not binding, it will be well to inform the Divisional Magistrate so."

The parties were not represented by counsel.

JUDGMENTS :—*Muthusami Aiyar, J*:—The term "adultery" in S. 488, Criminal Procedure Code, must be construed with reference to its definition in S. 497 of the Indian Penal Code. There is no finding in the present case that the concubine is a married woman and the Joint Magistrate seems to suppose that every illicit connection with a woman whether she is married or not, and whether, if married, with her husband's consent or connivance or not, is adulterous. This view cannot be accepted as the legal conception of adultery, and the ground on which the Joint Magistrate rests his decision cannot be supported without further enquiry. The complainant stated in her evidence that her husband insisted on her getting her meals from the concubine and it was held in Criminal Revision Case No. 118 of 1883, (*Marakkal* v. *Kandappa*, I. L. R, 6 M, 371), that the offer to maintain must be an offer to maintain with the consideration due to her position as wife. A question may, therefore, arise if the complaint is well-founded whether the offer made is sufficient within the meaning of the proviso of S. 488, (see also Criminal Revision Case No. 547 of 1884). In his explanation to the District Magistrate the Joint Magistrate states that he has never followed the ruling of the High Court in Criminal Revision Case No 547 of 1884 because, in his opinion, it is directly opposed to the wording of the section and has always seemed to him unintelligible. I would here point out to the Joint Magistrate that it was his duty to have either followed the ruling of the High Court, or if he doubted its correctness, to have referred the matter to that court for reconsideration. There may be cases in which the husband may not bring the concubine into the family house or may arrange for the concubine not coming into contact with his wife and for the society of the former not being forced on the latter. I am not prepared to hold that either the husband's immorality which does not amount

to adultery or involve the degradation of a married woman being brought into the society of a concubine, is sufficient ground for the wife's refusal to live with her husband. I would set aside the order of the Joint Magistrate and direct him to rehear the case and pass fresh orders with reference to the foregoing observations.

Best, J:—It seems to me to be very doubtful if the framers of S. 488 of the Code of Criminal Procedure intended the word "adultery" as used therein to have the limited meaning given to it in defining the offence of adultery in the Penal Code. The offence is against the husband, as is recognized in S. 199 of the Code of Criminal Procedure which prohibits the court from taking cognizance of such offence except on the complaint of the husband or of some person on his behalf. Hence the necessity for the existence of a husband and absence of consent or connivance on his part to constitute such offence. But so far as a wife seeking an order for maintenance under Chapter XXXVI of the Code of Criminal Procedure is concerned, the wrong done to her is in no way affected by the circumstance of her husband's concubine being married or unmarried or in case of her being married, whether it is with or without her husband's consent or collusion that she is living in such concubinage.

However, any other than the limited interpretation of the word as defined in the Penal Code is impossible in the face of the concluding clause of S. 4 of the Code of Criminal Procedure, which directs that "all words and expressions used herein and defined in the Indian Penal Code and not hereinbefore defined, (and the word adultery is not one of those 'hereinbefore defined'), shall be deemed to have the meanings respectively attributed to them by that Code."

I concur therefore in the order proposed by my learned colleague.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best

P. R. Rajah Gounden ... ... Appellant. (*Plaintiff*).*

v.

M. Rajah Gounden and others .. Respondents. (*Defendants*).

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* A. S. No. 24 of 1892. 16th November 1893.

Rajah Gounden v. Rajah Gounden.

Revenue Recovery Act II of 1864, S. 59—Limitation—Setting aside revenue sale—illegality and irregularity.

There is no distinction between an illegal and an irregular revenue sale in regard to the period of limitation for setting it aside.

Even a sale which contravenes some express provision prohibiting such sale must be sought to be set aside within six months.

Appeal against the decree of the Subordinate Judge of Bellary and Salem at Salem in Original Suit No. 6 of 1890.

The facts of the case so far as they are necessary for the purposes of this report are as follow:—

The suit was brought on the 31st March 1890 to set aside a sale of a mittah sold on the 16th June 1886 for arrears of revenue under Madras Act II of 1864 on the ground that the sale was illegal. The grounds of illegality urged by the plaintiff were that it was contrary to the provisions of Regulation X of 1831, inasmuch as no guardian had been appointed to the minor plaintiff, that the movables belonging to the family had not been attached first although they were sufficient to meet the Government demand and that the demand issued by the Collector was directed to deceased land-holders. It was contended by the appellant that these objections to the sale amounted to illegalities and not mere irregularities and that the period of limitation was twelve years from the date of the sale and not the special period of six months prescribed by Act II of 1864.

R. Shadagopachariar for appellant.

The Acting Government Pleader (*S. Subramaniem*) for respondent No. 9.

P. S. Sivaswami Aiyar for *V. Bhashyam Aiyangar* and *T. Subramania Aiyar* for respondent No. 1.

JUDGMENTS :—*Best, J*:—* * * * The period of limitation for a suit of this kind is six months from the date of the sale, (see S. 59 of Act II of 1864 and *Venkata* v. *Chengadu*, I. L. R, 12 M, 168). The appellant's contention that the limitation prescribed by the above section is inapplicable to sales which are open to the objection of illegality (as distinguished from mere irregularities) by reason of their contravening some express law—such as Regulation X of 1831, as alleged in the present case, is

opposed to the recent ruling (dated 8th July 1893) of the Privy Council in *Raja Gobind Lal Roy* v. *Ramjanam Misser** (not yet reported I believe), where a similar contention in the case of a sale under Act XI of 1859 was disallowed on the ground that "a sale is a sale made under the Act within the meaning of the Act, when it is a sale for arrears of Government revenue, held by the Collector or other officer authorized to hold sales under the Act, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale, *or in consequence of some express provision for exemption having been directly contravened.*" * * * * * *

Muthusami Aiyar, J:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Best.

Cheriamakantagath Mammad... ... Petitioner (*Deft.*)†

v.

Uthama Chund Rama Chund Sett ... Counter-Petitioner (*Plff*).

Civil Procedure Code, Ss. 295, 622.

Mammad. *v.* Rama Chund.

Where an application by a rival decree-holder for rateable distribution of sale proceeds under S. 295, Civil Procedure Code, has been allowed: *held*, that the High Court cannot revise the order of the court below under S. 622, Civil Procedure Code.

Petition under Section 622 of the Civil Procedure Code praying the High Court to revise the order of the District Munsif of Quilandy passed on Miscellaneous Petition No. 1056 of 1892 (Original Suits Nos. 138 and 374 of 1890 on the file of the Principal District Munsif of Calicut).

An application for rateable distribution was made by a rival decree-holder out of the assets realized by sale on the 18th of August 1892 in execution of another decree against the judgment-debtors. Counter-petitioners objected on the ground that the judgment-debtors were not the same in both the decrees and that the assets had been realized prior to the application for execution

* Now reported at I. L. R, 21 C, 70.

† C. R. P. No. 648 of 1892. 13th December 1893.

by the petitioner. The District Munsif held against the objections but allowed rateable distribution.

The counter-petitioner applied for revision to the High Court under S. 622 of the Code of Civil Procedure.

K. Naraina Row for petitioner.

P. R. Sundara Aiyar for counter-petitioner.

JUDGMENT:—The preliminary objection is taken that this is not a case in which revision is allowed by S. 622 of the Code of Civil Procedure, and in support of this objection reference is made to the case reported in L. R, 11 I. A, 237, *Rajah Amir Hassan Khan* v. *Sheo Baksh Singh*.

On the other hand I have been referred on behalf of the petitioner to *Birj Mohun Thakoor* v. *Rai Uma Nath Chowdhry*, L. R, 19 I. A, 154. In this latter case, however, it was expressly found that the Subordinate judge had "declined to exercise a jurisdiction which he had, and exercised one which did not belong to him;" the former, in not confirming under S. 312, a sale for the setting aside of which no application had been made under S. 311; and the latter, in setting aside the sale under S. 313 on the application of a person not entitled to make such application under that section.

The present case is one in which the District Munsif clearly had jurisdiction and the mere fact of his decision being erroneous is not sufficient to justify its revision under S. 622 as held in L. R, 11 I. A, 237.

This petition is therefore dismissed with costs.

NOTE:—See *Venkataraman* v. *Mahalingayyan*, I. L. R, 9 M, 508, also *per contra Sec Bun* v. *Shibchunder*, I. L. R, 13 C, 225 and *Viraraghava* v. *Parasurama*, I. L. R, 15 M, 372.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, Kt. Chief Justice and Mr. Justice Shephard.

Raghava Mudaliar ... ... Appellant (*Defendant*).*

v.

M. Narayanasami Mudaliar ... ... Respondent (*Plaintiff*).

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* S. A. No. 1022 of 1892. 22nd December 1893.

Raghava Mudaliar v. Narayanasami Mudaliar.

Hindu Law—Alienation by will by widow with reversioner's consent—Validity of—Disqualification for succession—Insanity not congenital.

A testamentary disposition by a widow with the consent of the next reversioner cannot confer a title to the estate on the devisee

Obiter dictum:—Where a Hindu father dies leaving ancestral property and a son insane at the time of his death, the son is not entitled to take the property. Insanity need not be congenital to disqualify a person for inheritance.

Second Appeal against the decree of the District Judge of Chingleput in Appeal Suit No. 81 of 1891 confirming the decree of the District Munsif of Poonamallee in Original Suit No. 758 of 1889.

One Pachayappa Mudali who owned ancestral property died leaving two sons Thoppai and Veerabhadra, the former of whom was insane at the time of their father's death. Veerabhadra died some years afterwards and on his death the properties went into the possession of Pachayappa's widow Unnamalai Ammal. On the 8th February 1882 she executed a will with the consent of the next reversioner whereby she gave the properties to the plaintiff subject to certain conditions. Plaintiff now sued to recover them from the defendant alleged to be a trespasser. The defendant pleaded, *inter alia*, that the plaintiff could acquire no right under the will as a widow could not grant more than her life estate and that Thoppai was the owner of the property not being congenitally insane. The District Munsif found that Thoppai was insane at the time of his father's death and continued to be so, that Unnamalai Ammal was entitled to the property during her lifetime as the heir of her son Veerabhadra, that the will made by her with the consent of the next male reversioner operated to pass the property to plaintiff and gave a decree to the plaintiff. The District Judge on appeal upheld the Munsif's decision.

The defendant preferred a second appeal to the High Court.

V. Bhashyam Aiyangar and *V. C. Desikachariar* for appellant.

R. Shadagopachariar for respondent.

JUDGMENT:—On the 8th February 1882 a document described as testamentary was executed in favor of Narayanasami Mudali by Unnamalai Ammal the widow of Pachayappa Mudali the adopted son of Kondappa at the date of the execution, and at the time of Unnamalai's death a few days later, there was living one

of her two sons who had survived her husband's death. It is found by the District Judge that this son Thoppai by name though not congenitally insane was insane when his father died in 1868 and continued to be so afterwards. It is also found by the District Munsif that Vaithinada the next reversioner entitled to the property of the family after the widow's death, it being assumed that she took a widow's estate, consented to the execution of the document.

On these facts two questions arise, *viz.*, first, whether Thoppai on account of his insanity was incapable of possessing the ordinary rights of a member of a Hindu family, and secondly on the assumption that the first question is answered in the affirmative whether Unnamalai, having a widow's estate only, did effectually convey the property to the plaintiff by the instrument above-mentioned. With regard to this latter question, it was argued for the defendant that although the widow might with the next reversioner's consent have alienated the property by a conveyance, *inter vivos*, she could not do so by will and it was contended that the document was in truth what it purported to be, a will. In this contention we think the defendant is right. The document is in substance as well as in name a will and it has been treated as such by the parties throughout this litigation. It was not the widow's intention that the grant should take effect immediately and the whole estate should be at once vested in the grantee. This being so, the case is governed by the decision of the Judicial Committee in *Behari Lal* v. *Madho Lal Ahir Gayawal*, I. L. R, 19 C, 238 and we must hold that the plaintiff has failed to estabiish his title. We observe that this point does not seem to have been taken in the courts below and although in the grounds of appeal to the District Judge exception was taken to the finding of the District Munsif with regard to Vaithinada's alleged consent, that ground of appeal does not seem to have been argued. The main point to which the attention of the District Judge was called was the insanity of Thoppai and the question of fact and law connected therewith. On the question of law assuming the facts to be as above-stated we think the District Judge was right in the conclusion at which he arrived. We agree with the opinion of the High Court of Bengal that a consideration of the texts shows that it is not necessary that madness should

be congenital to disqualify a person for inheritance, *Ram Sahye Bhukkut v. Lalla Laljee Sahye,* I. L. R, 8 C, 153. No case to the contrary was cited to us in which the point actually arose for decision.

In the Bombay case it was blindness and not insanity that was in question and the opinion of the court expressed with regard to madness was clearly influenced by the reading of Narada given in Jagannatha's digest. See *Murarji Gokuldas* v. *Parvatibai,* I. L. R, 1 B, 182 which reading Professor Jolly has shown to be incorrect, Tagore Lectures, 1883, p. 275. Since we are of opinion that the alienation by the widow did not pass a valid title to the plaintiff we must allow the appeal and reverse the decrees of the courts below. But as the defendant has not succeeded on the point mainly relied on in the Lower Court, we leave each party to bear his own costs. The costs of the second appeal must be paid by the plaintiff.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Muthusami Aiyar.

Shunmuga Pillai ... ... Applt. (1st *Deft., Petr*).*

v.

Ramanathan Chetti ... ... Respt. (2nd *Plff., Counter.-Petr.*)

Shunmug. Pillai v. Ramanatha Chetti.

Civil Procedure Code, Ss. 25, 223—Transfer of execution—Jurisdiction—Mortgage decree—Execution against property not mortgaged—Share of coparcener not sold.

Held, that the transfer of a decree passed by a District Court and exceeding in value the jurisdiction of the District Munsif for execution to a District Munsif is valid.

Held also, where a mortgage decree is passed against one of two undivided brothers directing the sale of family property and execution against the person of the defendant for the balance after deducting the sale proceeds, the decree-holder is entitled to claim execution against property of the defendant other than that mortgaged without first proceeding against the share of the other brother who was no party to the suit, it not appearing that the mortgage debt was binding upon his share.

Appeal against the order of the District Judge of South Arcot dated 30th August 1892, passed on Civil Miscellaneous Appeal No. 20 of 1891, confirming the order of the District Munsif of

* C. M. S. A. No 70 of 1892, 25th January 1894.

Chidambaram passed on Execution Petition No. 354 of 1891 and Miscellaneous Petitions Nos. 503 and 598 of 1891 (Original Suit No. 19 of 1888 on the file of the District Judge of South Arcot).

A decree was passed by the District Court of South Arcot in Original Suit No. 19 of 1888 for the sum of Rupees 5,000 recoverable by sale of the mortgaged property and personally against 1st defendant. The decree was transferred for execution to the file of the District Munsif of Chidambaram. On application by the decree-holder for execution, the judgment-debtor the 1st defendant objected to the decree-holder proceeding against property not mortgaged without realizing by sale of the entire property mortgaged the amount of the decree. The decree-holder had only sold the share of the 1st defendant in the mortgage property but not the moiety belonging to his brother who had obtained it on partition subsequent to the mortgage decree. The District Munsif held that the decree-holder was entitled to seek the personal remedy without proceeding against the share of the judgment-debtor his brother who was no party to the decree. This order was affirmed on appeal by the District Court.

Defondant No. 1 preferred this second appeal to the High Court.

P. R. Sundara Aiyar for *V. Krishnaswami Aiyar* for appellant.

T. Ranga Ramanujachariar for respondent.

JUDGMENT:—Two questions arise for determination in this appeal and the first is, whether the District Munsif had jurisdiction to execute the decree in Original Suit No. 19 of 1888. Though the objection was not taken in either of the courts below, it relates to the inherent jurisdiction of the District Munsif and is patent on the face of the proceedings and I am of opinion that such objection may be taken at any stage of the case. The decree which is being executed by the District Munsif was passed upon a hypothecation bond for more than Rupees 5,000 which is considerably in excess of his pecuniary jurisdiction and it is contended on appellant's behalf that the judge had no power to transfer such decree for execution to a District Munsif. As to the question whether this contention ought to prevail, there is a conflict of opinion among the different High Courts. It was decided in the negative in the

case reported at I. L. R, 7 M, 397, *Narasayya* v. *Venkatakrishnayya*, and in C. M. A. No. 47 of 1888, but in the affirmative in *Gokul Kristo Chunder* v. *Aukhil Chunder Chatterjee*, I. L. R, 16 C, 457 and *Durga Charan Mojumdar* v. *Umatara Gupta*, I. L. R, 16 C, 465, and in *Shri Sidheshwar Pandit* v. *Shri Harihar Pandit*, I. L. R, 12 B, 151. The last case was decided in 1887, the case reported in 7 Madras was decided in 1884 and the Calcutta case in 1889. The learned judges at Calcutta who decided *Gokul Kristo Chunder* v. *Aukhil Chunder Chatterjee* considered the Madras case and expressed themselves as being unable to concur in the decision therein.

That decision depends on the construction put on S. 223 of the Code of Civil Procedure. Section 25 which relates to transfer of suits authorises the transfer to a Subordinate Court "competent to try the same in respect of its nature and the amount or value of its subject-matter." These words of limitation are not found in S. 223 which relates to transfer of applications for execution of decrees. That section not only omits the condition that the court to which it is sent for execution must be competent to determine the suit in which the decree was passed, but also substitutes for it five other conditions. The first condition, clause (*a*) premises that the judgment-debtor resides or carries on business or works for gain within the local limits of the jurisdiction of the court to which the decree is sent for execution. The second condition, clause (*b*) presupposes that the judgment-debtor has not sufficient property within the jurisdiction of the court which passed the decree, but has property within the jurisdiction of the court to which the decree is sent for execution. The third condition, clause (*c*) premises a case in which immovable property is ordered to be sold, and such property is situated outside the jurisdiction of the court which passed the decree. The fourth condition, clause (*d*) postulates the existence of some special reason for the transfer which the court that orders the transfer is required to state in writing. The fifth condition premises that the court to which the decree is sent for execution is subordinate to the court which passed the decree. Looking at the nature of the several conditions, they suggest the inference that the legislature contemplated a special convenience, or a special facility or some special reason or a special relation as subordinate and appellate

courts, as grounds for the transfer. There is thus reason to conclude that the condition as to jurisdiction, inserted in S. 25, was omitted from S. 223 for the special reasons mentioned therein. It follows that if the condition as to jurisdiction mentioned in S. 25 and intentionally omitted from S. 223 were imported into it, the special facility or convenience which it was the intention of the legislature to secure to judgment-debtors in certain cases might be taken away from them, and the object which the legislature had in view, might be defeated. Suppose for instance the case of a decree passed by a District Court or Subordinate Court for Rs. 2,600 and of the judgment-debtor residing within the jurisdiction of a District Munsif or possessing property only within that jurisdiction; why should the special convenience or facility which might exist if the decree were executed by the District Munsif be denied to the judgment-creditor? Again, the specification of five special cases in S. 223 implies that in other cases the court executing the decree must be competent to decide the suit in which the decree was passed. Hence it was inferred in *Narasayya* v. *Venkatakrishnayya* that in framing the five conditions, the legislature intended to denote the statutory exceptions founded on special considerations to the rule which regulates the ordinary jurisdiction. Further, the penultimate clause of the section states expressly that when a decree transferred for execution is that of a Provincial Court of Small Causes, the Presidency Small Cause Court to which it is transferred must also have jurisdiction over the suit in which the decree was passed as regards its subject-matter. The express mention of the ordinary rule in this paragraph emphasizes its omission in the five cases mentioned in the first paragraph of the section. There is also reason for holding that the Code of Civil Procedure contemplates certain exceptions to the ordinary rule, that a court can only exercise jurisdiction, over proceedings of civil nature when the subject-matter therein does not exceed in value the pecuniary limit of its jurisdiction as defined by S. 12 of the Civil Courts Act. Take for instance a claim preferred in regard to a house of Rs. 3,000 value in the court of a District Munsif during the execution of a money decree passed by him for Rs. 2,400. Which is the court competent to investigate the claim? Is it the District Munsif who passed the decree or the Subordinate or District Court, as the case may be, that has

jurisdiction to try a suit relating to a house of Rs. 3,000 value? The language of S. 278 shows that it is the District Munsif who was executing the decree that is authorized to investigate the claim.

The reason mentioned for holding that no exceptions were intended to be created is, that intricate questions of importance are likely to arise as often in execution of decrees as in the trial of suits; but it must also be remembered that there are cases in which execution of decrees may be a simple matter giving rise to no questions of special difficulty. In order that the cases may be differentiated, the legislature has given a discretion to the District Court in whom the power of transfer is vested, and also enacted S. 239 in addition to S. 228. Furthermore, the special relation of the court to which the decree is sent for execution, under para. (6) as a Subordinate Court will enable the District Court to call up the application for execution for disposal by itself when questions of exceptional difficulty arise therein for consideration.

The grounds on which the decision in the Madras case rests may thus be formulated. As in suits so in execution proceedings, the competent *forum* is ordinarily that indicated by S. 12 of the Civil Courts' Act, but in the five cases mentioned in S. 223 special reasons exist for departing from that rule and creating a special or extraordinary jurisdiction. In view to show that this view is not tenable, the High Court at Calcutta refers to Ss. 3, 6, 9, 228 and 649, in addition to S. 25 of the Civil Procedure Code and S. 12 of the Civil Courts' Act. The learned judges think that this court overlooked the rule that the word "suit" may include as well proceedings after decree, as proceedings before decree.

First as to S. 12 of the Madras Civil Courts' Act it is referred to in the Madras decision and its applicability to cases other than those specified in the second and third paragraphs of S. 223 is recognized. But what is stated there is, that an extraordinary or a special jurisdiction was conferred by the Code of Civil Procedure in cases to which paragraphs 2 and 3 relate. The absence of this special jurisdiction would render ineffectual the considerations of special convenience and facility implied by the five conditions in S. 223 to which reference has already been made. As regards S. 25, the word 'suit,' may no doubt include in its extensive sense proceedings after as well as before decree; but it may also possibly

be used in its popular and restricted sense to connote proceedings before decree, as contradistinguished from execution proceedings. The presence of additional words in S. 12 of the Civil Courts' Act and in S. 3 of the Code of Civil Procedure lends weight to the view that in S. 25 it was used by the legislature in its restricted sense. Even assuming that it includes execution proceedings, the limitation as to jurisdiction can only be imported into S. 223 so far as it is consistent with that section. To import it into that section so far as it relates to the special cases founded on special consideration would be incongruous and not only do violence to the plain grammatical interpretation but also deny to judgment-debtors the special convenience and facilities contemplated in these cases.

As to S. 3, it exempts pending proceedings from the operation of the Code and refers in terms to proceedings prior to decree in any suit instituted or appeal presented before the 1st June 1882 or to proceedings after decree that may have been commenced and were still pending at that date. This section furnishes an argument in support of the view that when proceedings after decree are intended to be denoted the legislature said so expressly. As to Ss. 6 and 9 they are relied on as indicating that the term 'suit' may be taken to include execution proceedings, but I have already stated that on that view, the limitation as to jurisdiction in S. 25 can only be imported into S. 223 so far as it can be done without incongruity.

With reference to S. 649 it recognises the principle which ordinarily regulates the jurisdiction in execution proceedings, but it does not negative an intention to create a special jurisdiction in the five cases specified in S. 223. After carefully considering the Bombay and Calcutta decisions, I do not see where the fallacy lies in the reasoning adopted in 7 Madras and I must therefore adhere to the principle of that decision therein until the Full Bench overrules it.

The second question for decision is whether appellant's omission to bring to sale Tiagaraja Pillai's share is a bar to the execution of his decree against other than mortgaged property, until he cures the omission. In the present case there is no doubt a direction in the decree, that respondent shall first execute the decree against the mortgaged property, but the direction

presupposes that the property belongs solely to appellant or that the decree is binding on Tiagaraja Pillai. It must be observed here, that Tiagaraja Pillai was not a party to that decree and that the partition suit brought by Tiagaraja Pillai was pending at the date of decree under execution. It is not even alleged that in the decree since passed in the partition suit the mortgage debt was either mentioned as a family debt or that Tiagaraja Pillai had his share decreed to him, subject to payment of a moiety of that debt. The respondent was therefore justified in not proceeding against Tiagaraja Pillai's share, lest by so doing he may run the risk of involving himself in litigation which may entail on him expense. The direction is binding only so far as it does not compel him to invade the rights of third parties, who were not parties to the decree. This view is in accordance with that taken by the High Court at Allahabad in *Zalim Gir* v. *Ram Charan Singh*, I. L. R, 10 A, 630. In that case a Zamindar executed two mortgages of his Zamindary property in favor of one Panna Lal, one, on the 10th October 1871, and the other, on the 10th October 1872. On the 27th January 1874, he mortgaged about 117 bighas out of his Zamindary for Rs. 700 to the defendant in that case. On the 10th September 1877 he made a conditional sale of the Zamindary property in favor of the plaintiff for Rs. 4,500 to pay off the two charges created in favor of Panna Lal. On the 10th August 1878 the Zamindar made another mortgage to the defendant for Rs. 300 of the same 117 bighas. On the 8th November 1881 the defendant obtained a decree on his two mortgages of the 27th January 1874 and of the 10th August 1878, and on his application for execution of the decree, the mortgaged property was advertised for sale on the 20th November 1883. Meanwhile the plaintiff took the necessary proceedings to foreclose his conditional sale and upon the 18th March 1883 the sale was foreclosed. On the 19th November 1883 the plaintiff brought a suit to have it declared that defendant was not entitled to bring the property to sale, and it was held that he was not entitled to do so, before first recouping the plaintiff the amount due on the prior encumbrances. It is therefore competent to respondent in the case before us to apply for execution against other than the mortgaged property if he can show that the portion of the mortgaged property not brought to sale belongs to appellant's divided brother. It is urged on behalf of appellant that the

decree under execution was passed against appellant as the managing member of a joint Hindu family during the subsistence of coparcenary, for a debt contracted for purposes binding on all the coparceners; but the decree is not produced before me; nor am I referred to any document showing that the decree was passed against appellant as the representative of the joint family whilst the absence of all allusion to the debt and to Tiagaraja Pillai's liability for his moiety thereof negatives the contention.

The appeal fails and I dismiss it with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar.

Reference under Court fees Act, S. 5.*

Reference under Court Fees Act, S. 5

Civil Procedure Code, Ss. 411, 412—Decree on compromise—Order as to court fee.

In a pauper suit which is disposed of upon a compromise it is competent to the court to make an order under Ss. 411 and 412 of the Civil Procedure Code, as to the payment of the court fee.

Case referred for the decision of the High Court under S. 617 of Act XIV of 1882 by the District Judge of Kistna in his letter dated 12th August 1893, No. 1347.

The case was stated as follows:—

"In Original Suit No. 9 of 1892 on the file of this court the plaintiff filed the suit against a widow for a declaration that plaintiff is the adopted son of her late husband and heir to about twenty acres of land. The plaintiff sued as a pauper.

"When the suit came to trial, the parties came to an agreement and the pleaders on both sides filed a razinamah which stipulated that the widow give up to plaintiff 11·60 acres out of the suit property and that plaintiff relinquish his claim to be the adopted son of her late husband. Regarding costs, it was stipulated that the parties should bear their own costs and that if the court fee on the plaint be exacted, it should be paid by plaintiff alone. I passed a decree under S. 375 and the question then arose whether plaintiff must pay the plaint court-fee under Ss. 411 and 412 of the Code.

"The plaintiff's pleader cited *The Collector of Kanara* v. *Krishnappa Hegde*, I. L. R., 15 B, 77, and contended that there is

* Ref. Case No. 12 of 1893. 26th January 1894.

no judicial labour and no adjudication. The word *shall* in S. 375 is mandatory. The word *succeed* in S. 411 and *fails* in S. 412 mean after contest.

"My own opinion is that the decision of the Bombay High Court upon which plaintiff relies is wrong. I do not understand why the idea of a contest is imported into Ss. 411 and 412. If a plaintiff withdraws, he fails. If the defendant withdraws, the plaintiff succeeds, although there has been no contest. The court fee paid on a plaint is paid to obtain a decree of the court, whether that decree be a consent decree, a compromise decree, or a contest decree. I am of opinion that plaintiff must pay the court fee on the plaint."

E. Venkatarama Sarma for appellant.

The Acting Government Pleader (*S. Subramaniem*) : *contra.*

JUDGMENT:—I consider that it is competent to the judge to make an order under Ss. 411 and 412 of the Code of Civil Procedure as to the payment of the court fee. It is contended for the plaintiff that the sections are not applicable to cases in which a decision is passed in terms of a compromise. The words in the sections are "succeeds" and "fails in the suit" and they refer to the ultimate decision or the result of the suit and not to the mode in which the decision is arrived at. I should be doing violence to the language of the section if I introduced into them the words "after contest" which I do not find in them, and on this ground, I am not prepared to follow the decision reported in *The Collector of Kanara* v. *Krishnappa Hegde,* I. L. R, 15 B, 78 and 79. Costs of this reference will be costs in the cause.

FULL BENCH.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, Kt. Chief Justice, Mr. Justice Muthusami Aiyar, and Mr. Justice Shephard.

Palamalai Padiachi and another ... Appellants (*Defts.* 1 & 4).*

v.

Shanmuga Asari ... ... Respondent (*Plaintiff*).*

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* C. M. A. No. 94 of 1891. 23rd November 1893; 6th February 1894.

Palamalai Padiachi v. Shanmuga Asari.

Regulation VI of 1831, S. 3—Suit for possession of Inam lands—Jurisdiction of Civil Courts excluded.

A suit for the recovery of possession of service Inam lands is a suit for the possession of the emolument of a hereditary office within S. 3 of Reg. VI of 1831 and is excluded from the jurisdiction of the Civil Court.

Appeal against the decree of the District Judge of South Arcot in Appeal Suit No. 254 of 1890 presented against the decree of the District Munsif of Vriddhachalam in Original Suit No. 694 of 1889.

Plaintiff brought a summary suit No. 10 of 1887 against the defendants in the Court of the Head Assistant Collector under Regulation VI of 1831 for the possession of the plaint lands on the ground that he was the carpenter of the village of Kandiyankuppam and that the lands were 'Maniam' lands attached to his office as carpenter. The Head Assistant Collector in his judgment Exhibit B, found that the defendant's occupation is unlawful, and that the plaintiff who is the village carpenter is the proper person to be in possession of them, *i.e.*, of the 'Maniam' lands. An appeal was made to the Collector and he confirmed (Exhibit C) the Head Assistant Collector's decree, but remarked that there was no means of carrying out a decree under Regulation VI of 1831. On the 23rd August 1889 the plaintiff applied to the Head Assistant Collector to be put in possession in accordance with the decree in the above suit, but the Head Assistant Collector by his order Exhibit E, referred the plaintiff to the Civil Court. Plaintiff then brought his suit in the Lower Court to recover possession of the lands and Rs. 30 as mesne profits. The District Munsif dismissed it on the ground that the land is unenfranchised service Inam land and that under Regulation VI of 1831 claims regarding such lands are not cognizable by Civil Courts. The District Judge on appeal held that the suit is barred by S. 3, Regulation VI of 1831.

The defendants Nos. 1 and 4 preferred this appeal to the High Court.

R. Subramania Aiyar for appellants.

C. R. Pattabhirama Aiyar for respondent.

This appeal first came on for hearing before *Muthusami Aiyar* and *Wilkinson, J.J,* on the 10th October 1892, when the court made the following order of reference to the Full Bench.

ORDER:—"We are unable to reconcile the decision at I. L. R, 13 M, 41, *Ravutha Koundan* v. *Muthu Koundan*, with the provisions of S. 3 of Regulation VI of 1831 and with the decision reported at 5 M. H. C. R; 360, *The Collector of Kistna District* v. *K. Chinnamarazu*.

"The present suit is one for the possession of the emoluments of a certain hereditary office and such a suit is apparently barred by the operation of S. 3, Regulation VI of 1831. We therefore refer the question, whether the suit is so barred, to the Full Bench."

[This case again came on for hearing before *Collins, C.J*, *Muthusami Aiyar* and *Shephard, J.J.* on the 23rd November 1893 when the court expressed the following opinion.]

JUDGMENT:—"This is clearly a suit within S. 3 of the Regulation and we must therefore answer the question in the affirmative. There is no necessary conflict between the two cases cited in the order of reference."

[This case again came on for final disposal before *Muthusami Aiyar* and *Best, J.J*, who, in accordance with the opinion of the Full Bench, setting aside the decree of the District Judge, restored that of the District Munsif, and decreed that respondent must pay appellant's costs in this court and also in the Lower Appellate Court.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Ganapati Bhatta ... . Appellant (*Plaintiff*).*

v.

Raghaweshvara Bharati Swami and another. Respondents (*Defts*).

Caste head—Ex-communication—Jurisdiction—Validity of order.

Held, that a provisional order of ex-communication passed by the head of a caste to which the plaintiff belonged for neglecting to visit him, refusing to pay him the customary fee, and associating with ex-communicated members of the caste is valid, the order having been passed in the proper exercise of his authority and within his jurisdiction. Ganapati Bhatta v, Bharati Swami.

Second Appeal against the decree of the Subordinate Judge of South Canara in Appeal Suit No. 37 of 1891, confirming the

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* S. A. No. 1603 of 1892. 7th February 1894.

decree of the District Munsif of Mangalore in Original Suit No. 245 of 1889.

The facts of this case appear sufficiently from the following judgment of the High Court.

C. R. Pattabhirama Aiyar for appellant.

C. Ramachandra Row Sahib for respondents.

JUDGMENT :—The parties to this appeal are Havik Brahmins who form a sub-division of the Brahmin community in South Canara. First respondent is the head or the ecclesiastical chief of the sub-caste; the 2nd is his Parupathyagar or manager; and appellant is a member of the caste subject to the spiritual jurisdiction of 1st respondent. On the 17th May 1887, 1st respondent issued against appellant a provisional order of ex-communication and communicated it to the Vaidikas and Grahastas, secular and lay Brahmins of Mangalore. Three caste offences are mentioned in the order. The first is that when the Guru went to appellant's division or Hobli, appellant neglected to visit him, and pay the kanike or fee as other Havik Brahmins did, though he was duly apprised of 1st respondent's arrival; the 2nd is that when the people of Vittal remonstrated with him against his conduct and advised him to see his Guru, he referred to his disapproval of the ex-communication of one Sham Bhatta and others of the Bayar village and to his promise to those persons to continue in caste communion with them, and declared that it was not necessary for him either to see the 1st respondent or to pay to him the arrears of kanike or fee. The 3rd caste offence is that he associated with persons already ex-communicated in defiance of 1st respondent's authority as the chief of his sub-caste. The order proceeds then to state that it shall be in force until appellant attends before 1st respondent and obtains an order disposing of the matters mentioned therein. It purports to be signed by 2nd respondent under the orders of 1st respondent.

Appellant brought this suit to have it declared that the order passed against him is unjust and invalid on the ground that it was issued without notice to him and that he suffered thereby both in his property and reputation. In defence respondents admitted the order, but alleged that it was only provisional and that it was fully competent to 1st respondent as the head and chief of his

caste to issue such order. The District Munsif considered that 1st respondent was at liberty to deal with questions relating to caste and religious usages, that the Civil Courts ought not to interfere to prevent 1st respondent from correcting caste misconduct. In this view, the District Munsif dismissed the suit with costs; and on appeal the Subordinate Judge confirmed the decision. He observed (1) that the order was provisional in its nature, (2) that the decisions marked as Exhibits I to III and VI, and that reported in *The Queen* v. *Sankara,* I. L. R, 6 M, 381, showed that, as Guru, 1st respondent had authority to enquire into the misconduct of his disciples and to punish them for caste offences and derelictions. He was also of opinion that appellant's liability to pay kanike or subscription or fee was a caste matter and that appellant had no right to complain unless the fee demanded was unreasonable or extortionate which it was not in the case before us as evidenced by Exhibit XIV. He found further that due notice was given to appellant, and that if no enquiry was held it was because of appellant's contumacious conduct in refusing to attend such enquiry. He also remarked that appellant asked but for a declaratory decree in regard to a temporary interdict or an *ad interim* order in respect of certain caste imputations and that in his judgment this was a case in which he in the exercise of the discretion vesting in him under S. 42 of the Specific Relief Act might properly refuse to pass a merely declaratory decree. Hence this second appeal.

For appellant it is contended that upon the facts found, the decision of the Subordinate Judge is wrong in law; but we are unable to accede to this contention. The relation between appellant and 1st respondent is that of a member and the ecclesiastical chief of his caste. Whether the disciple should visit his Guru and make his obeisance, whether the former should pay the latter a kanike or fee by virtue of the spiritual relation and whether the disciple should abstain from intercourse with persons already ex-communicated by his Guru, are matters relating to the autonomy of caste with which, as the head of the caste, 1st respondent has jurisdiction to deal according to recognized caste custom. It was held in *The Queen* v. *Sankara,* I. L. R, 6 M, 381, and *Murari* v *Suba,* I. L. R, 6 B, 725, that a Guru's jurisdiction extends over such matters. This being so, the facts found show

that 1st respondent exercised his jurisdiction *bonâ fide*. It is found that the fee demanded was neither unreasonable nor extortionate. It is not denied that appellant did violate the duty which he owed to 1st respondent by refusing to visit him. The provisional nature of the order shows that care was taken to see that the punishment by way of ex-communication, which as ecclesiastical chief 1st respondent was competent to inflict, was not more extensive than was necessary to enforce obedience to caste duties. As observed by the Subordinate Judge, if there has been no enquiry, its absence is due to appellant's contumacious refusal to attend for such enquiry. On a matter relating to caste customs over which the ecclesiastical chief has jurisdiction, and exercises his jurisdiction with due care and in conformity to the usage of caste, the Civil Courts cannot interfere.

The decision of the courts below is open to no legal objection and we dismiss this appeal with costs.

FULL BENCH.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, Kt. Chief Justice, Mr. Justice Muthusami Aiyar, Mr. Justice Shephard, Mr. Justice Best, and Mr. Justice Davies.

Reference under Stamp Act, S. 46.*

Reference under Stamp Act S. 46.

Stamp Act I of 1879, Sch. I, Art. 4—Agreement for lease.

A agreement in writing to execute a lease of a Zamindari which contemplates a formal lease being afterwards executed is an agreement for a lease and liable to be stamped under Art. 4, Sch. I of the Stamp Act.

Case referred for the decision of the High Court, under S. 46 of Act. I of 1879 by the Board of Revenue (separate revenue), Madras, in their letter No. 449, dated 30th January 1894.

The case was referred as follows:—

"I am directed by the Board of Revenue under S. 46 of the Indian Stamp Act, to refer the question raised in the enclosed letter from the Collector of Madras, for the decision of the Honorable the Judges of the High Court.

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* Ref. Case No. 4 of 1894. 1st March 1894.

"On the 11th January 1886, the Zamindar of Sivaganga entered into an agreement marked A, with the Rajah of Nilambur and another to lease the Zamindari to the latter in consideration of his debts, to the extent of 16 lakhs of rupees, being discharged by them. At the time of the agreement, the Zamindari was under attachment, and the Zamindar undertook to execute a formal deed of lease after obtaining a certificate from the court under S. 305 of the Civil Procedure Code. The agreement in question was engrossed on an eight-anna stamp paper, apparently under Article 5 (c) of Schedule I. The question at issue is whether the stamp was sufficient and, if not, under what Article of Schedule I the instrument ought to have been stamped?

"The main grounds on which it is contended that the agreement was properly stamped are that as the Zamindari was under attachment, the document was not and could never have been intended to operate as a lease, and that the subsequent conduct of the parties resulting eventually in the execution of a formal and duly stamped deed of lease makes it clear that the agreement of the 11th January 1886 was intended as a mere agreement and nothing else.

"The Board while conceding that the agreement was not intended to operate as a lease is unable to accept the conclusion that it is therefore not liable to duty under Article 4, Schedule I of the Stamp Act. In that Article it is stated clearly that an agreement to lease is chargeable with the same duty as a lease and there is no saving clause to indicate that the intention (which in the present case may be admitted), to execute a regular lease subsequently, makes any difference. The charge of the full duty both on an agreement to lease and on a lease executed in pursuance thereof is guarded against by the proviso to Article 39. The Board considers that the law may be read as meaning that an agreement to lease is chargeable as a lease, whether an actual lease is subsequently executed or not and notwithstanding any *bona fide* intention on the part of the executants of the former subsequently to execute the latter; otherwise the proviso to Article 39 would be superfluous."

The Government Pleader (*E. B. Powell*) for appellant.

W. Grant for respondent.

JUDGMENT :—We are of opinion that the document is an agreement for a lease and that it must be stamped as such under Article 4, Schedule I of Act I of 1879, notwithstanding that another instrument was intended to be executed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arthur J. H. Collins, Kt. Chief Justice and Mr. Justice Davies.

Srirangachariar and others ... Appellants (1st, 3rd, 4th & 6th *Defts.*).*

v.

Ramasami Aiyangar and others... Respondents (*Plffs.*)

Srirangachariar. v Ramasami Aiyangar.

Unlawful agreement—Stifling prosecution—*Res judicata*—Civil Procedure Code, S. 13—Similar conditions of appealability—Limitation Act XV of 1877, S. 22—Transposition of defendant as plaintiff—Specific Relief Act I of 1877, S. 42.—Suit to declare agreement invalid—Suit by one of several executants to set aside an agreement.

An agreement part of the consideration for which is the abandonment of a non-compoundable criminal charge is contrary to public policy and therefore illegal, and void.

A decision by an appellate court in a suit of a small cause nature in respect of which there is no second appeal cannot operate as *res judicata* to prevent the trial of a subsequent suit in which a second appeal would be competent.

Where parties who are defendants are subsequently transposed as plaintiffs they must be deemed to be added as plaintiffs, within the meaning of S. 22 of the Limitation Act and the suit should as regards them be deemed to have commenced only from the date of such transposition.

No suit will lie under S. 42 of the Specific Relief Act for a mere declaration that a certain instrument is invalid.

Where the agreement is executed by several parties any one of them may sue to set aside the agreement and relieve himself from liability.

Appeal against the decree of the District Judge of South Arcot in Original Suit No. 4 of 1889

The 1st plaintiff brought this suit against the defendants for a declaration of his hereditary right to the office of Archaka in a temple, for a declaration that an agreement executed by him and the 8th and 9th defendants to the defendants Nos. 1 to 7 was invalid and for certain other reliefs. The agreement was impeached on the ground that it was executed with the object of stifling a

* A. S. No. 55 of 1893. 6th March 1894.

criminal prosecution in a case which could not be compounded and was therefore unlawful. The agreement, however, made no reference to the prosecution or to its abandonment. The 8th and 9th defendants who were also Archakas possessing equal rights with the plaintiff were originally made defendants on the ground that they did not join the plaintiff in the institution of the suit. They were subsequently made the 2nd and 3rd plaintiffs upon their application. The defendants contended, *inter alia*, that the suit was barred by reason of a former decision in Original Suit No. 790 of 1886 on the file of the District Munsif of Chidambaram, which had been brought by the defendants against the plaintiffs for the recovery of a sum of Rs. 75 due under the agreement, that the suit for a declaration was barred by limitation so far as the 2nd and 3rd plaintiffs, at any rate, were concerned, that the agreement was not unlawful, and that the suit for a declaration regarded as a suit by the 1st plaintiff alone was not maintainable. The District Judge found that the agreement was executed for an unlawful consideration, namely, the abandonment of the criminal charge, that the suit was not barred by *res judicata* as the former suit was in the nature of a small cause suit and there was no second appeal therein, that the suit was not barred by limitation even in respect of the 2nd and 3rd plaintiffs as they were parties to the suit from the very beginning though as parties defendants, and that the 1st plaintiff alone was competent to ask for a declaration of the invalidity of the agreement though executed by him jointly with others.

The plaintiff No. 1 preferred this appeal to the High Court.

C. R. Pattabhirama Aiyar for appellants.

S. Subramaniem, V. Bhashyam Aiyangar and *P. S. Sivaswami Aiyar* for respondents.

JUDGMENT :—There can be no doubt that part of the consideration for the agreement A was the withdrawal of a pending criminal charge of trespass and theft laid against the plaintiffs and others, (vide Exhibit B), on the 14th February 1886, that is, two days before the execution of A. The 1st plaintiff as plaintiff's 3rd witness has sworn that it was so, and his evidence stands uncontradicted, not even one of the defendants denying it. It is further proved that the very Magistrate who would have tried the charge laid if it had been proceeded with was present, taking part in the

negotiations that led up to A. There is also no doubt of the law that a consideration that proceeds upon the withdrawal of criminal proceedings that have been instituted is illegal as being opposed to public policy, as it is held to be the stifling of a prosecution. And even if this illegal consideration is only part of the consideration it renders the whole agreement void, because there is not good and sufficient consideration: *Lound v. Grimwade*, L. R., 39 Ch. D., 605. We therefore confirm the District Judge's finding in this respect It is next contended for the appellant that the question of the validity of the agreement could not be re-opened because it was *res judicata* by reason of the previous decision of the District Court in Appeal Suit No. 269 of 1887 holding it to be valid. That appeal, however, was made in a suit of a small cause nature before the District Munsif of Chidambaram (Original Suit No. 790 of 1886), and the subject-matter thereof was consequently not open to second appeal. It has been held by the Bombay High Court, *Govind Bin Lakshmanshet Anjorlekar* v. *Dhondbarav Bin Ganbarav Tambye*, I. L. R., 15 B, 104, that a decision in a suit of that character will not operate as *res judicata*, and that ruling has been more than once followed by this court, (vide *Vithilinga Padayachi* v. *Vithilinga Mudali*, I. L. R., 15 M, 111 and the judgment in Second Appeals Nos. 93 to 114 of 1892*), and we see no reason to depart from it now, and must therefore disallow this contention.

We find however that the 2nd and 3rd plaintiffs are not entitled to the declaration setting aside the agreement A, because we find that they did not sue in time for this relief. The agreement A is dated the 16th February 1886 and this suit was brought by the 1st plaintiff alone on the last day allowed by a three years' limitation. The 2nd and 3rd plaintiffs not having joined the 1st plaintiff in bringing the suit, he made them defendants. It was not until the 25th January 1892 that by an order of the judge passed under S. 32, Code of Civil Procedure, they were made plaintiffs. They were therefore not made co-plaintiffs till more than three years after their cause of action arose, and under S. 22 of the Limitation Act, the suit should be deemed to have been instituted when they were so made parties. The period of limitation for setting aside a document is under Art. 91 of the second Schedule to the Limitation Act three years from the time the plaintiff knew

* See *ante* p. 31.

of it. These plaintiffs Nos. 2 and 3 knew of it on the 16th February 1886 when they executed it and therefore their inclusion as plaintiffs in the suit on the 25th January 1892 was made too late. It is contended on their behalf, (1) that being defendants in the suit they were already parties thereto when it was brought, and S. 22 of the Limitation Act is therefore not applicable to their case, and (2) that the relief as prayed for was not to set aside the document but merely to declare it invalid and the Article of Limitation applicable was 120 of the second Schedule allowing six years' time as for a suit for which no period of limitation is otherwise provided, under which these plaintiffs would be in time. We cannot accede to either of these views and the cases quoted, (*Nagathal* v. *Ponnusami*, I. L. R, 13 M, 44, and *Khadir Moideen* v. *Rama Naik*, I. L. R., 17 M, 12), do not support either contention. As to the 1st point the 2nd and 3rd plaintiffs were "added" as such, only on the date they were taken from the ranks of the defendants, and it is only then they were "so made" parties. Section 22 of the Limitation Act therefore clearly applies to them. As to the 2nd point there is no such suit as for a mere declaration that an instrument is invalid. Section 42 of the Specific Relief Act shows in what matters mere declaratory suits are admissible. The only suit possible under that Act in regard to an instrument is one under S. 39 to have the document adjudged void and to have it cancelled, and Art. 91 of the second Schedule to the Limitation Act is the particular Article applicable to such a case. The result is that the decree so far as it sets aside the agreement A must be modified by declaring that it is not set aside against plaintiffs Nos. 2 and 3. It is then argued by appellant's Vakil that 1st plaintiff cannot alone sue for that relief as the agreement is a joint agreement of all three plaintiffs. If there was any technical defect in this respect it was cured by the addition of the 2nd and 3rd plaintiffs before the decree was passed. But in our opinion had the name of 1st plaintiff stood alone throughout he was entitled to sue to evade his individual responsibility under the agreement, because there was a several as well as a joint liability under it.

The appeal is therefore dismissed with costs as against 1st plaintiff. It is allowed as against 2nd and 3rd plaintiffs to the

extent indicated above and the decree of the lower court will be modified accordingly. These plaintiffs will bear their own costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Reference under Court Fees Act, S. 5.*

Reference under Court Fees Act, S. 5.

Court Fees Act VII of 1870, S. 7, Cl. IV, (*b*) and (*c*)—Suit for partition of property in joint possession—Stamp duty on.

A suit for partition by one claiming to be in joint possession with defendant of the property in suit is similar to one for partition of joint family property and chargeable with an *ad valorem* fee.

Case referred under S. 5 of Act VII of 1870, by the Registrar and Taxing officer of the High Court of Judicature, Appellate Side, Madras.

The case was referred as follows :—

"The question submitted for consideration is what is the amount of court-fees leviable on a memorandum of appeal in a suit for division and allotment of plaintiff's half share of property of which plaintiff and defendant are joint owners and which is in the possession of their tenants (*i.e.* lessees), one half of it being held by tenants under plaintiff and the other half by those under defendant.

"The plaintiff is the Zamorin of Calicut and the defendant is a Nair. The property in suit is not "the joint family property" of the parties, but the origin of the joint ownership is stated by plaintiff to be that the Zamorin as ruler of the country confiscated the whole of the Nair's property for rebellion and on the Nair's submission restored one half and retained the other half.

* * * *

"The finding of the Subordinate Judge (of Palghaut) is that whether the right was acquired by confiscation or by contract, the property has been from time out of mind the joint property of plaintiff's and defendant's stanams and are held by them on equal rights in undivided moieties and that plaintiff is entitled to have a half of it allotted by partition.

Ref. Case No. 5 of 1894. 12th March 1894.

"The value of the property as set forth in the plaint is Rs. 99,546-9-0 calculated under S. 7, Cl. V, (b) and (c) and plaintiff paid the *ad valorem* fee (Rs. 1175) on a moiety thereof in the court below.

"The Subordinate Judge disallowed certain items and decreed that the rest be divided into two equal shares and that one of them be delivered to plaintiff and the other to defendant.

"The defendant appeals. The memorandum of appeal is drawn up on a 10 Rupees court fee stamp only and in it he takes objection to the findings of the Subordinate Judge on the general issues (referred to above) in the case, and also to the findings as to the particular items of property mentioned in the 15th to the 29th grounds of the appeal memo. He was called upon to value these items and pay *ad valorem* fee thereon. But he contends that as the plaintiff alleges he is in possession the suit falls under Article VI, Clause 17, Schedule II of the Court Fees Act and relies on the decision in *Kirty Churn Mitter* v. *Aunath Nath Deb,* I. L. R, 8 C ,757. * * * *

"The question as to who is in possession did not arise in the case which proceeded on the footing of the property being in the holding of the demisees (not parties to this suit) under plaintiff or defendant. The report of the Calcutta cases, quoted by Vakil, does not show on what ground the claim for partition was rested. There is no Madras case bearing on the point."

S. Subramaniem, R. Balajee Row, and *P. R. Sundara Aiyar* for appellant.

The Government Pleader (*E. B. Powell*) for respondent.

JUDGMENT :—The suit is for partition and exclusive possession of specific moieties of property which is at present in joint possession of the parties. It is clearly not a suit for mere declaration; and the value of the property is easily ascertainable.

The suit is similar to one for partition of joint family property which is chargeable with an *ad valorem* fee.

We are unable to follow the decision in *Kirty Churn Mitter* v. *Aunath Nath Deb,* I. L. R, 8 C, 757 and *Mohendro Chandra Ganguli* v. *Ashutosh Ganguli,* I. L. R, 20 C, 762.

We hold that an *ad valorem* fee is payable.

IN THE PRIVY COUNCIL.*

Present :—Lord Watson, Lord Macnaghten, and Sir Richard Couch.

Narainasawmi Pillai ... ... Appellant (*Petitioner*).

v.

Cuppusawmi Pillai .. . Respdt. (*Countr.-Petr.*)

[On appeal from the High Court at Madras.]

Narainasawmi Pillai v. Cuppusami Pillai.

Power of High Court to allow withdrawal of appeal to Privy Council.

On the application of a minor appellant who has lodged an appeal to the Privy Council in which the printed record has not been transmitted, the High Court has power to order the withdrawal of the appeal when it is satisfied that the compromise leading to the application for withdrawal is beneficial to the minor.

Petition for leave to proceed with the appeal to the Privy Council against the decree of the High Court of Judicature at Madras in Appeal Suit No. 90 of 1885 which had been allowed to be withdrawn by order of the High Court on Civil Miscellaneous Petitions Nos. 171 and 172 of 1889.

The facts of this case appear sufficiently from the following report.

Mr. J. D. Mayne for petitioner.

Mr. Mayne.—May it please your lordships, this application raises a question which as far as I am aware has never arisen, certainly in this tribunal; whether, in the case of an infant appellant, a High Court, after an appeal has been finally admitted to Her Majesty, has jurisdiction to accept a compromise altering the terms of the decree, one of the terms of the compromise being that the infant's appeal should be withdrawn and thereupon to strike the appeal off the file, so as to shut out the infant from prosecuting it.

Sir Richard Couch.—Off the file of the High Court.

Mr. Mayne.—Off the file of the Privy Council.

Sir Richard Couch.—The file in the High Court of Madras, not the file here ?

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* 10th February 1894.

Mr. Mayne.—No, of course not the file here. They had not forwarded the record. It had not got here.

Sir Richard Couch.—The question is whether they had power to do it while it still remained there.

Mr. Mayne.—Yes, after the appeal had been admitted.

The facts of the case are set out at full length in the petition, but I think I can put them very shortly before your lordships. There were two brothers, Sathya, and Nagalinga, who were undivided brothers. Nagalinga died in November 1878, having previously adopted Cooppoosawmy, the present respondent. Cooppoosawmy was adopted being an only son, and was given in adoption by his mother, after the death of his father. Sathya died in June 1883, having adopted Narainasawmy, the present appellant. Immediately after the death Narainasawmy, commenced a suit against Cooppoosawmy, in which he claimed the whole of the property, asserting that Cooppoosawmy's adoption, in the first place, never took place; in the second place, that if it did take place it was invalid, first of all, because he was an only son, and could not have been taken; secondly, because, on the same ground, his mother, after the father's death, had no authority to give him in adoption. Cooppoosawmy, on the other hand, alleged that Narainasawmy was not adopted in fact, no objection being offered to his adoption in law. Both courts found that both adoptions had taken place in fact, and that Cooppoosawmy's adoption was valid in law. The result was that both courts gave a decision, giving Narainasawmy a decree, not for the whole, but for half the property—in fact dividing the property equally between the two, as it would properly be divided if they were properly adopted. I should have mentioned that Narainasawmy was represented in the litigation by three guardians. The first guardian was his natural father. The other guardians were the widows of Sathya, and therefore his adoptive mothers. A decree of the High Court was passed in April 1887. An application was made to allow an appeal to be admitted. The usual certificate was given that the value was sufficient. It was Rs. 35,000. Of course the only ground of appeal which could be put forward was the ground of law—because the question of fact had been conclusively settled. The petitioner applied that it should be admitted on the ground that the court had gone wrong on the two questions of law

connected with the adoption. First of all a certificate was given and then a final order that all the necessary deposits and securities had been made. The final order admitting the appeal was made on the 24th of August 1888. With regard to the merits of the case, of course we have nothing whatever to do with that here, but I think it is material to point out that the case was pre-eminently one which was a fitting case for appeal to this court. The first question whether an only son can be taken in adoption is one upon which all the Pundits, and all the courts in India have been differing from the very first year of the present century.

Lord Watson.—I do not understand the observation that we have nothing to do with the merits of the case.

Mr. Mayne.—I mean I cannot ask your lordships now to decide the merits of the case, but it is essential for me to point out that the case is one resting upon a point of law which, it is most desirable and proper, should be brought before your lordships for decision

Lord Watson.—The question is whether *prima facie* it is a settlement which was fair and beneficial to the minor.

Mr. Mayne.—The point I put before your lordships is that that is a question which the High Court at that stage of things had no power to consider.

Sir Richard Couch.—When you speak of its being desirable and proper to have this question settled, might it be not desirable that it should not be done at the expense of these people ?

Lord Macnaghten.—The fact that it was a doubtful question is a very good reason for compromising from one point of view.

Lord Watson.—If this had been a question depending on materials of fact with which the court who previously decided the case was familiar I should be very much influenced by the opinion of the court as to the character of the facts. The peculiarity of this case appears to me to consist of two points, and I may tell you at once the difficulty. It is beneficial to the minor if the court have taken a right view of the law, and it is prejudicial to the minor if the court are wrong in their view of the law. That seems to be the only consideration, because there is no consideration given to the minor for giving up his right to try that very question. The

result of it seems to be this; they say there was consideration. Here it is in the petition [reads] ; but that would have followed.

Mr. Mayne.—Of course it would. His rights to the mesne profits which is the only thing the other party gives up, is a right which he will not have if the decision is reversed. What I am proposing to submit in the first place is that the court had no jurisdiction to give such an order.

Lord Watson.—They withdraw from the file an order that had been placed there with the consent of the party who placed it.

Mr. Mayne.—Yes.

Lord Watson.—That is very strong. The parties come into court, and settle, and say, "We have agreed that that order should be discharged." Does not that give the court power to discharge it?

Mr. Mayne.—I submit not.

Lord Watson.—Have they lost all jurisdiction?

Mr. Mayne.—I quite admit that if it were a case of an adult, and he came into court, and said, "I have got an order admitting the appeal, and I have found all the necessary security, and the money is lodged, and everything, and I do not intend to go on with my appeal for certain reasons which seem proper to myself."

Lord Watson.—Take the ordinary case of two litigants of full age, and *sui juris*, and one of them enters an appeal which is admitted by the court, and he lodges the requisite security. I have no doubt there are applications which you can make to the Privy Council in such circumstances. But suppose these two people settle their differences, and one says, "I give up my right of appeal." They must get their money back.

Lord Macnaghten.—Would you say the High Court was bound to forward the record to this tribunal?

Sir Richard Couch.—You admit that in the case of adults it can be done?

Lord Macnaghten.—And that the court had power to hold its hand in that case?

Mr. Mayne.—Yes.

Lord Macnaghten.—If they had it in that case why had not they in this?

Mr. Mayne.—I will state in a moment why. What I say is if an ordinary adult, a full aged litigant, came forward and said, "I have got my leave to appeal, I have lodged all the necessary security. Nothing is to be done now except to forward the appeal. I want to stay all proceedings. Do not go to any expense on my account. Stop all the proceedings and give me back all the money."

Lord Watson.—How can they give him back his money? You say they have no jurisdiction to touch the order under which it was lodged, but they have power to return the money.

Mr. Mayne.—I say they would have the power in the case of an adult litigant, but in the case of an infant litigant it would not be a mere ministerial act. They have to exercise a judicial proceeding. They have to look at the terms of the compromise which is placed before them. They have to consider whether those terms of compromise are beneficial to the infant, because unless they are beneficial to the infant they cannot make an order which will bind the infant when he comes of age; and in order to enable themselves to give permission to withdraw the appeal they have to exercise certain further judicial acts in considering whether their own decree is one which may probably be reversed or not—whether the terms which were offered to the infant (in this case there were really no terms) to make it a proper thing that he should abandon his chance, if he has a chance, of getting his judgment reversed are so beneficial to him that they should allow an act to be done which will bind that infant when he comes of full age.

Lord Watson.—What strikes me is this. It is all very well to call it a compromise. It is unlike any compromise I ever saw. It is an agreement to abide by the judgment and give up the record: nothing more.

Mr. Mayne.—There is nothing more; there is no compromise.

Lord Macnaghten.—Is there no consideration of any sort?

Mr. Mayne.—I will read the terms.

Lord Macnaghten.—You said something about mesne profits. Does he give up more ?

Mr. Mayne.—Not an atom. I suppose he had been in possession of rather more. The suggestion is, though I cannot see any foundation for it, that the plaintiff infant had, by means of his guardians been in possession of more than he would be entitled to if he was only entitled to half, and therefore that he would have to give up some mesne profits; and as far as I can see the only consideration is that the other party says, "If there are any mesne profits in your possession which are more than you would be entitled to by either of the decrees that have been given dividing the property equally between us, I make no demand for that."

Lord Macnaghten.—That is a concession.

Mr. Mayne.—No, it is no concession, upon the supposition that the decree is right.

Lord Macnaghten.—Yes, of course it is. Upon that supposition it is a concession.

Mr. Mayne.—Upon that supposition, but upon no other.

Sir Richard Couch.—How does that affect the jurisdiction? At present you are upon this; that they had no jurisdiction to do this because they were obliged to consider this matter.

Lord Macnaghten.—Supposing they had plainly in the interest of the infant come to the conclusion that the appeal was not to be prosecuted. Having admitted that adults at that stage could ask the court to stay its hand, do you say the court could not stay its hand in the case of infants ? I do not understand the difference.

Mr. Mayne.—I submit that the court has no power to do any judicial act with regard to its own decree, because this is a judicial act with regard to its own decree. It is altering the terms of its decree. The result is that whereas it decrees that the plaintiff had possession beyond what he was entitled to, part of it should be given over to the other person. That is an alteration of its own decree.

Lord Macnaghten.—In favor of the infant.

Mr. Mayne.—In favor of the infant, but I submit it had no power.

Lord Watson.—I do not think the court had power to recall its own decree, but it had power to give effect to a settlement produced and approved by them subsequently, although in giving effect to it they might reverse the terms of their own decree.

Sir Richard Couch.—That was the effect of the consent, was not it?

Mr. Mayne.—That was the effect of the consent.

Sir Richard Couch.—If the parties consented.

Lord Macnaghten.—Surely if all the persons in a position to advise the infant, and who had been consulted on behalf of the infant, came to the court and said, "It is not worth while to prosecute this decree; we will accept a small consideration, and let the whole thing drop," do you say the court could not give effect to that?

Mr. Mayne.—Your lordship said "all" the parties.

Lord Macnaghten.—I put it as high as that.

Mr. Mayne.—I had not finished my statement. The father opposed the whole thing.

Sir Richard Couch.—Upon the question of jurisdiction, you say they had no jurisdiction?

Mr. Mayne.—I say they cannot do any judicial act.

Lord Watson.—But suppose there was money paid into court, and that there was a judicial order to pay that money to one of the litigants, finding that he is entitled to it. Is there any thing to prevent the court, when the parties arrange terms between themselves, subsequently directing that money to be paid out? It reverses the decree. It is directly in the teeth of the decree, but it is by the consent of the party who holds it.

Lord Macnaghten.—Suppose the respondents come forward and say, "We will pay down a thousand pounds;" and persons authorised to speak on behalf of the infant come to the court and say "We think that a very beneficial arrangement."

Mr. Mayne.—I say they could not do any thing which would bind the infant.

Lord Watson.—That is another point,

Sir Richard Couch.—You are upon the question of jurisdiction.

Mr. Mayne.—The way I put it is this. We come here, and say, we are not bound by this proceeding. The court say, "You are bound by the proceeding. There is no Privy Council appeal on our file at all, and the reason is because we have consented to an arrangement which we consider to be beneficial to you." But if they had not consented to the arrangement as being beneficial to him either the appeal would be on the Privy Council file now, or their act in striking it off the Privy Council file would be one which would not bind the plaintiff.

Lord Watson.—If you could satisfy us that guardians litigating for an infant have no power to bind the infant by a beneficial compromise, *cadet questio.* It is not a question of jurisdiction of the court. It is a step taken in court, and an order by the court, which might be valid as between two persons of age, and *sui juris,* but may not bind an infant. It is possible. It depends upon circumstances. That must be through some defect in the agent's power.

Lord Macnaghten.—If the court might take the step or refuse the step of forwarding the documents, I do not see why the same rule would not apply.

Mr. Mayne.—The distinction seems to be this. If an adult appellant comes, and says, "Give me back my money. Do not go to any expense. I have lodged my money for a certain purpose. I do not intend that purpose to be carried out." I think the court would as a mere ministerial matter, without the exercise of any judicial discretion,—

Lord Macnaghten.—Then the court having come to the conclusion that it was beneficial to the infant not to prosecute his appeal, why cannot the court do the same thing?

Mr. Mayne.—Because I submit that the court after its decree has passed, and after it has admitted an appeal to Her Majesty, after every step has been taken necessary to make that go forward, has no power to do any act which involves the exercise of a judicial discretion as to whether, that appeal to Her Majesty is for the benefit of the infant or not.

Lord Macnaghten.—Then you say they have no power to consider the question?

Mr. Mayne—I say they have no power to consider the question of benefit to the infant. In the case of an adult it is not necessary for them to consider the question. It may be the maddest thing in the world.

Lord Watson.—The object of the enquiry is to ascertain whether the parties to the compromise before that have power to make it, or not. That, as it seems to me, is the only question. If A and B, who are not infants, litigate, they obtain a final judgment from the court on the merits of the case, and then execution is stayed, and then they go to the court, and ask the court to discharge the order which one of them has obtained with a view to appeal to the Privy Council, and allow the judgment of the court to take its course.

Sir Richard Couch.—When one of the consenting parties is a guardian they must have power to enquire whether the guardian is acting properly or not.

Lord Macnaghten.—I could have understood it if you said the court below discharged their duty, and had nothing more to do with it—that they must go on and send these documents to the Privy Council, and any application should be made to the Privy Council. When you once admit that the court may hold its hand in the case of adults I do not understand what difference there is in the case of infants, assuming that the court has decided that the compromise is for the benefit of the infants. Otherwise the result would be that at the expense of the infants the documents must be transmitted here, and the application must be made to this court, throwing a burden on the infant, which is unreasonable, and which ought to be avoided.

Lord Watson.—It is the duty of the court not to listen to the proposition if they were acting in their own behalf. The court would have no hesitation, I have no doubt, in acting on the joint consent, but the parties are not necessarily entitled to make an arrangement; and all the court enquires is whether they have that title. A guardian if acting for the benefit of the infant has power, but if it is against the infant's benefit he has not the power, and the court satisfies itself.

Mr. Mayne.—No doubt they acted under S. 462 of the Code of Civil Procedure. "No next friend or guardian shall without the leave of the court enter into any agreement or compromise on behalf of the minor with reference to a suit in which he acts as next friend or guardian. Any such agreement or compromise entered into without the leave of the court shall be voidable against all parties other than the minor." That is the section which rendered it necessary for the court before it allowed the appeal to be withdrawn to exercise what I call a judicial act.

Lord Macnaghten.—To exercise a judicial discretion ?

Mr. Mayne.—To exercise a judicial discretion.

Sir Richard Couch.—You say in this particular case they cannot exercise that judicial discretion.

Mr. Mayne.—I say in this particular case of an infant appellant they cannot exercise the discretion, that they are *functus officio*. The only other section in the Code which refers to the compromise of suits is 375. "If a suit be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect of the whole or any part of the matter of the suit, such agreement, compromise, or satisfaction, shall be recorded, and the court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final so far as relates to so much of the subject matter as is dealt with by the agreement, compromise, or satisfaction." That clearly applies to a compromise before a decree. The court cannot after decree has been passed allow any compromise or satisfaction to be entered which will alter the terms of the decree. There is another section as to adjustment of debts to which it is proper that I should call your lordships' attention, S. 257. I submit that does not apply to this case. "Every agreement to give time for the satisfaction of a judgment-debt shall be void unless it is made for consideration, and with the sanction of the court which passed the decree and such court deems the consideration to be under the circumstances reasonable."

Sir Richard Couch.—It must be recognised by the court. That was introduced in order to cure the bad practice, which did exist, of alleged settlement out of court. That does not touch this question.

Mr. Mayne.—No, and S. 375 A does not touch it.

Lord Macnaghten.—Suppose this respondent said, "If you will not prosecute the appeal you shall have three-fourths instead of one-half," do you mean to say the court could not give its sanction to that?

Sir Richard Couch.—You seem to admit that it could.

Lord Macnaghten.—No, he says it could not. The appellant was an infant. Suppose the court were satisfied that, that was a very beneficial compromise, do you say it could not have given effect to it?

Sir Richard Couch.—You must come to the question whether it was beneficial or not.

Mr. Mayne.—The only way in which I think that could be carried out on behalf of an infant would be by stopping the appeal and then when the infant came of full age,—

Lord Macnaghten—That would be no compromise at all, because the other side, of course, would say, "I am not going to give you this unless it is a final settlement of every thing."

Lord Watson.—It would be the duty of the court notwithstanding that the parties appeared and informed the court that the case was compromised, to forward the record. The statutes are imperative. Down to the time of admitting the appeal they seem to have a certain amount of discretion, but not afterwards. Do you say the court are bound to allow the order to stand, if it is to stand, and that they are bound to forward the record here unless they are stopped by an order of the Privy Council?

Mr. Mayne.—I submit they are, except in the case of an appellant of full age, who can withdraw the appeal without the court exercising any judicial act, or discretion, or consideration upon the case.

Lord Watson.—That seems all to be founded upon the assumption that the admission of an appeal is by necessity a removal of the whole process to this Board.

Lord Macnaghten.—He does not contend for that, because he says in the case of adults the court has *not* power.

Lord Watson.—There was nothing before this Board at that time, only leave had been given to take a certain procedure which would bring the case before the Board when followed out. Can we deal with an appeal till the record is here?

Mr. Mayne.—Undoubtedly the record would have to come here.

Lord Watson.—The process of review is a process of removal from one court to the other; and when the removal has taken place I admit the court below can do nothing. The parties must apply somewhere. It would be very awkward if in all proceedings the parties had to come here. How are we to know what has taken place there without some judicial intimation? I am not saying there are not some cases where the parties may come here before the record arrives, if there is a failure to forward the record. I do not express any decided opinion upon these points, but that is a very different thing from saying that the court below could take no steps, or consent to both parties putting a stop to that course of procedure, which would end in bringing the case here. It would be a very strong proposition.

Mr. Mayne.—If that is your lordship's opinion then I would submit an alternative. I would ask your lordships to allow us special leave.

Lord Watson.—You ask us to allow the whole case to be brought up as if that consent had never been given.

Mr. Mayne.—No, my lord.

Lord Macnaghten.—You appeal against the order.

Mr. Mayne.—I want to appeal against the order finding that this compromise was beneficial to the infants, and therefore withdrawing the appeal. That is all I can ask.

Lord Macnaghten.—That is an appeal against the exercise of judicial discretion. I do not say that it is impossible.

Mr. Mayne.—It is a judicial act.

Sir Richard Couch.—It is subject to what has been said with regard to the exercise of a discretion by the Lower Court. It is quite a matter of discretion with them. Whether it was beneficial to the infant is a matter peculiarly for the court to enquire into,

Mr. Mayne.—I submit that I am right in saying and Lord Watson appears to be of the same view—that it really is not a compromise at all. It is merely a direction that you should give up everything that you have been struggling for all along and the defendant says, "If you give up everything you have been struggling for all along I will not be curious about whether you may not have in your pocket a little more than you ought to have;" and there is no finding that he has an atom more in his pocket than he ought to have, and the probability is that he has not. Would your lordship allow me to read what is called the compromise?

Sir Richard Couch.—When you call it a compromise, the court has found—rightly or not is another question—that it was for the benefit of the infant that the appeal should not be further proceeded with.

Mr. Mayne.—The court, of course, thought it was right in its decree.

Sir Richard Couch.—What is the value of the property?

Mr. Mayne.—The value of the property for stamp duties and fees is Rs. 35,000.

Lord Macnaghten.—The infant is of age, and he comes and makes the application. He says the money is still in court.

Sir Richard Couch.—The value of the property now would not be £ 3,000,

Mr. Mayne.—All he cares about is the rupees, which are just as good in India as ever.

Sir Richard Couch.—You must not take the rupee at two shillings.

Mr. Mayne.—The value of the property in India is just as much as ever it was. The rupee is just as good in India as ever.

Sir Richard Couch.—That is rather questionable, but we will not discuss that. At all events if the appeal is prosecuted here the parties having to pay the expense of prosecuting it would be subject to all the loss in exchange whatever the value of the rupee might be.

Lord Watson.—S. 375 of the Code declares that if a suit be adjusted wholly or in part by any lawful agreement or compromise the decree so adjusted shall be final.

That decree is final if it were pronounced by a court having jurisdiction.

Mr. Mayne.—Does your lordship think that S. 375 applies to this case at all?

Lord Macnaghten.—I should have thought not myself.

Mr. Mayne.—With great submission to Lord Watson, I submit S. 375 clearly does not apply. It applies to a case where you relieve the court of all responsibility for passing a decree by presenting it with a decree; but that does not apply to a case where the decree has been passed.

Lord Macnaghten.—Will you tell me this for my information: In India if an infant wishes to appeal does he get the leave of the court in any process?

Mr. Mayne.—Not in any different process. This guardian applies, and takes every step, exactly as if the guardian were acting for himself.

Lord Macnaghten.—Would the guardian be personally liable for the costs if it were an unreasonable appeal, or could he recover them for the estate of the infant? No guardian in this country would appeal without some sanction.

Mr. Mayne.—I do not know of any decision, and his lordship Sir Richard Couch would probably corroborate me.

Sir Richard Couch.—A guardian or next friend would be liable to the costs of the other side. Whether he could get them from the estate would depend upon the same considerations as here.

Mr. Mayne.—No particular judicial sanction is necessary. Once he is on the record he acts exactly as if he were acting for himself, at his own peril as between himself, and his ward of course.

Lord Watson.—In the case of proceedings with a view to appeal here, one of the parties is ordered to lodge a certain sum of money in the hands of the court, and he obeys that order. Can the court pay the money without expressly, or by plain implication recalling their order? It is in the hands of the court subject to the order, and in strict form as long as the order stands, the clerk, or Registrar of the Court, or other official, must hold if for that purpose.

Mr. Mayne.—I have never in my own experience known of such an application being made.

Lord Watson.—It would be plainly against the terms of the decree.

Mr. Mayne.—The court would not be doing any thing against the terms of the decree. It would be quite in accordance with those terms.

Lord Watson.—The parties agree to dispense with proof. Is there any impropriety in the court recalling their order for proof by consent of both parties? This is not a determination upon the merits of the case at all. It is a step in procedure which stands in a very different relation. When the court have out and out decided the merits of the case they cannot alter their judgment. I admit that. If the parties wish to make a compromise they must do it in some way, but here all that the parties have to do is to recall an order which directs or allows a certain course of procedure. An order is given remitting a case to the jury by the court after discussion and after that the parties agree that a proof shall be taken before a Commissioner. Are not the court competent to recall their order?

Mr. Mayne.—I started, no doubt, with making an admission against myself, but I do not think I could have helped it.

Sir Richard Couch.—No, you could not have helped it.

Mr. Mayne.—A full grown litigant could say, "Give me back my money, and do not be going into a lot of expense that I do not want now." I think I could not resist making that admission; but I say there is a great distinction in the case of an infant, because the court could not make such an order in a manner that would prevent the infant ripping the thing up again. Amongst other things they have to consider how far there was any chance of the decision being reversed.

Lord Macnaghten.—There are two different steps. There is one proceeding in which the court comes to the conclusion that the compromise is for the benefit of the infant. Having done that what is the next step? The next step to be taken is to get rid of the appeal. They are quite different steps; and when it is decided

that it is for the benefit of the infant that the appeal should be dropped then the persons who are moving on behalf of the infant are in exactly the same position as an adult.

Mr. Mayne.—Of course if the court has that jurisdiction I admit the order would necessarily follow.

Sir Richard Couch.—It is directed by the Code that it shall be done. The guardian must get the sanction of the court. The court must have jurisdiction.

Lord Macnaghten.—When he has the sanction what is the difference between his position then and the position of an adult? The object of the order is to put him in that position.

Mr. Mayne.—Then my lords, I ask your lordships to give me special leave to appeal against the order allowing it; and I submit that this is very hard case. Here is a case purely resting upon two questions of law.

Lord Macnaghten.—Very interesting questions, no doubt.

Mr. Mayne.—As to one of the two questions of law there are only two authorities upon the subject, and both are against the decision of the Madras Court.

Lord Macnaghten.—Do you suggest that the court made an order in order to escape from an adverse decision on appeal?

Mr. Mayne.—No, my lord, of course not. What I say is when you look to the fact that there were purely questions of law, one of the questions of law being one as to which you may certainly say there is a very considerable probability that the decision might be reversed,—

Lord Macnaghten.—The court took all that into consideration; you cannot suggest that they did not.

Mr. Mayne.—Oh no.

Lord Macnaghten.—I could understand other judges in the position of these judges not sanctioning that compromise, but they have sanctioned it in the exercise of judicial discretion. It seems to be almost impossible to get out of that. They might have said, "The infant will be of age in a few months, and we will not interfere."

Sir Richard Couch.—The appeal, if we allowed it, would be an appeal against the exercise of this discretion, and nothing more at present ?

Mr. Mayne.—It would be a question whether the court had decided rightly that the withdrawal of the appeal was for the benefit of the infant.

Sir Richard Couch.—You could not in that appeal go into the question of the propriety of the decrees; you would not be allowed to do that.

Mr. Mayne.—Of course I could not argue it.

Lord Macnaghten.—The more doubtful the more reasonable the compromise.

Mr. Mayne.—What I should argue is that there is no compromise. He is simply enforcing his decree.

Sir Richard Couch.—The question is whether the court was right, or properly exercised its discretion, in saying that it was for the benefit of the infant that this litigation should not proceed any further.

Lord Watson.—Especially keeping this in view, that there seems to be equally difficult questions about your client getting anything,—

Mr. Mayne.—No, my lord.

Lord Watson.—Do they admit his title ?

Mr. Mayne.—There never was any objection in law to our title. The only objection was one of fact, and the facts are found in our favor by both courts ; but as regards the defendant there are two points of law. The plaintiff cannot possibly lose. He cannot be in a worse position than he is in, and he may be in an infinitely better position.

Sir Richard Couch.—If the appeal failed he would be in a much worse position, for he would possibly have to pay all the costs, his own costs and the respondent's costs of the appeal.

Mr. Mayne.—Lord Watson was suggesting that perhaps he might lose something by the original decree.

Lord Macnaghten.—Having regard to the quantum of the property the court might have thought that a very small amount would more than compensate for the possible chance of success.

Lord Watson.—What is the extent of it ?

Mr. Mayne.—For stamp duty half the estate which we claim in addition to what we have got already is calculated at about Rs. 35,000.

Lord Macnaghten.—There are costs to come out of that.

Mr. Mayne.—He has already Rs. 35,000. He wants Rs. 35,000 more.

Sir Richard Couch.—That is the value when the suit was first instituted.

Mr. Mayne.—It is the value in the appeal suit.

Sir Richard Couch.—What is the effect of the compromise, as you call it ? Does it relieve him from costs ?

Mr. Mayne.—No

Lord Macnaghten.—It relieves him from the litigation as to whether he was in possession of more than his just share. It is very small I agree.

Mr. Mayne.—This is the only section, Clause 6, which gives any consideration, "That the respondent do relinquish the moiety of the amount which he has to get out of the income of land obtained by the appellant from the date of the plaint to this date, and rents of building, &c., outstanding debts collected by them." There does not appear to be any assertion that we have collected anything more than a half.

Lord Macnaghten.—Surely the court must have taken that into consideration. In India, as in this country, in the case of an infant it does not always go by strict affidavit, or witness proof, but it makes enquiries, and learns a good deal.

Sir Richard Couch.—Suppose you got leave, and the appeal came here on the question whether the court had exercised a proper discretion or not, would you have much chance of success on an appeal from the exercise of the discretion of this court on a question of this kind ?

Mr. Mayne.—I admit my great difficulty would be that I should have no materials to put before your lordships. They seem to have acted simply on these petitions.

Lord Macnaghten.—They may have enquired for themselves. Does not somebody come before the court ?

Mr. Mayne.—Yes. The parties were represented, I suppose, by their Vakeels.

Lord Macnaghten.—It was competent to the court to make enquiries from them, was it not ? It would be very dangerous to admit it.

Mr. Mayne.—What I feel a great deal more than the danger of admitting it is perhaps when I came here I should be in a much better position than I am now.

Lord Watson.—What is the record to consist of when you come now ?

Mr. Mayne.—The record would consist simply of the decree.

Lord Watson.—What information would you lay before us ?

Mr. Mayne.—I could lay nothing before your lordships except what apparently the High Court had before them, which was two petitions, and two counter petitions.

Lord Macnaghten.—Then if you argue that the court ought not to have acted upon those alone probably the Board will assume that the court acted upon something besides that, on an admission of the parties, or something of that kind.

Mr. Mayne.—All I would submit to your lordships would be that upon the statements of these petitions there was nothing on which the court could find really one way or the other.

Lord Macnaghten.—That is very common in India, is it not ? It would be a very dangerous practice to lay down that whenever the court was considering whether a thing was for the benefit of the infant or not the whole thing from beginning to end should be in black and white so that another court might review it.

Sir Richard Couch.—And that there should be an appeal here from the decision of the court saying that it was a proper act for

the guardian to do—that in every case where a guardian did some thing, and obtained the sanction of the court for doing it, it might be brought on appeal here. It would be a very awkward precedent to make.

Mr. Mayne.—It would open a field for litigation.

Lord Watson.—It is not always the interest of a private individual to litigate in vindication of law.

Mr. Mayne.—I should have been very glad to argue the question before your lordships.

Lord Macnaghten.—It is a most interesting question.

Mr. Mayne.—Curiously enough, it has never come before this court.

Sir Richard Couch.—According to your petition there are the decisions of two High Courts one way, and two High Courts the other way.

Mr. Mayne.—They are all fighting amongst each other.

Sir Richard Couch.—The solution might possibly be, as I think it has been in some other cases, that each High Court has to keep its own law.

Mr. Mayne.—The High Courts have passed contrary decisions. It is very curious that it has never come here, and I hope it will before I die.

[Their Lordships rejected the appeal.]

IN THE PRIVY COUNCIL.*

Present:—Lord Hobhouse, Lord MacNaghten, Lord Morris, Sir Richard Couch.

Abdool Razack. . . . Appellant.

v

Aga Mahomed Jaffer Bindaneem. ... Respondent.

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* 1st March 1894.

Abdool Razack v. Aga Mahomed Jaffer.

Mohomedan Sheas—Marriage with a Burmese woman—Presumption as to marriage—Acknowledgment as to sonship.

To constitute sonship the acknowledgment must not only be of parentage but also of legitimacy. (*Ashrufood Dowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan* (11 M. I. A, 113) *referred to.*

Their Lordships declined to examine and discuss the tenets of Budhism in order to ascertain that the Budhist came under the same category as Jews and Christians with whom undoubtedly a Mahomedan may intermarry as it was a common ground of the parties in the courts below that such a marriage was invalid.

This was an appeal against the decision of the Recorder of Rangoon, British Burmah.

The facts of the case will appear sufficiently from the judgment of their Lordships which was delivered by

Lord MacNaghten :—Hadjee Hossain, who was a member of a Mahomedan family belonging to the Shiab sect and settled in Calcutta, traded as a merchant in Rangoon, made a fortune, and died there, married but without issue, in February 1890. He left a will by which he purported to dispose of all his property. Hadjee Hossain had an only brother of the full blood called Abdul Hadee, who died before him in March 1886. He too was engaged in business in Rangoon for many years, but his career was less prosperous, and he returned to Calcutta, a poor man some time before his death. The appellant claims to be the lawful son of Abdul Hadee by a Burmese woman, and as such to be the heir or one of the heirs of Hadjee Hossain and entitled, therefore, to a share in so much of his estate as he could not dispose of by will according to Mahomedan law. For the purpose of the present case it is conceded that the appellant's claim is well founded, provided he can make out that he either is or is entitled to be treated as the lawful son of Abdul Hadee. And the only questions in this appeal are these :—(1) Has it been established that a valid marriage took place between Abdul Hadee and the appellant's mother, Mah Thai, who was undoubtedly a Buddhist when she met her alleged husband? (2) If proof of legitimacy is wanting, is there sufficient evidence of the legitimation of the appellant by acknowledgment?

The learned recorder found that there was no marriage, holding upon the evidence that Mah Thai was not a convert to Mahomedanism. "It would it seems to me" he observed "be a mere mockery of the Mahomedan religion to say that there was a conversion, when there was not even a semblance of discussion on the

subject, when no priest intervened, and when the utmost the alleged convert can say is, that she repeated prayers in a language she did not understand." Taking this view he thought it unnecessary to consider the evidence as to acknowledgment. No acknowledgment in his opinion could confer the status of legitimacy upon the offspring of a Mahomedan and an unconverted Buddhist.

The learned counsel for the appellant took exception to the proposition upon which the Recorder's ruling seems to be based. It was a mistake, they said, to talk of conversion. No court can test or gauge the sincerity of religious belief. In all cases where according to Mahomedan law unbelief or difference of creed is a bar to marriage with a true believer, it is enough if the alien in religion embraces the Mahomedan faith. Profession with or without conversion is necessary and sufficient to remove the disability.

This criticism seems to be well founded. But the correction does not mend the appellant's case. There is nothing in the evidence tending to show that Mah Thai made any profession of the Mahomedan faith before or at the time of the ceremony which is said to have constituted marriage. Mah Thai was a witness for the appellant. She said that she knew nothing about the Mahomedan religion; all her life she lived and worshipped as a Burmese. While cohabiting with Abdul Hadee she worshipped as he did; she repeated his prayers. But she added that she did not understand the meaning of a single word. In re-examination she said that she ceased to be a Buddhist during her cohabitation with Abdul Hadee from the time of her marriage.

The learned counsel for the appellant then invited their Lordships to embark on a wider inquiry. They proposed to examine and discuss the tenets of Buddhism with the view of showing that Buddhists come under the same category as Jews and Christians, with whom undoubtedly Mahomedans may intermarry. But it was obviously impossible for their Lordships to entertain the question in the present case. In the court below it was common ground that such marriage would be invalid, and there was therefore no evidence before the court directed to the point.

In the next place it was urged that every presumption ought to be made in favour of marriage when there had been a lengthened

cohabitation, especially in a case where the alleged marriage took place so long ago that it must be difficult if not impossible to obtain a trustworthy account of what really occurred. There would be much force in this argument—indeed it would be almost irresistible—if the conduct of the parties were shown to be compatible with the existence of the relation of husband and wife. In cases like the present conduct is a very good test, and a safer guide perhaps than the recollection or imagination of interested biased witnesses.

Mah Thai's own account of the way in which she was treated may be accepted as a fairly truthful story, considering her relationship to the claimant, and the fact that she is speaking of what occurred many years ago. The alleged marriage took place somewhere about the year 1854. If that date is correct the connection between her and her alleged husband ceased in 1856, though Abdul Hadee did not leave Rangoon for good until more than twelve years afterwards. The marriage was proposed to her, she says, by a married sister of hers who was living in Rangoon, and who sent for her from her native village—a place called Mangi about half a day's journey off. She had already been married once, but that marriage was dissolved by mutual consent. Abdul Hadee was brought for her to see; she asked him if he would look after her and cohabit with her for a long time and he said he would. He came four or five times before the marriage. He said he would invite his male relatives but he was not going to invite his female relatives. At the marriage some money and a ring were put into her hands as dower; with that part of the ceremony she seems to have been previously acquainted and to have been careful to insist upon it; and her consent to the union appears to have been given in due form. Then we have a picture of her married life. After the marriage she was not allowed to go out. She never saw any of her husband's female relatives. She did not know why they did not come to see her. She was not allowed to go to the Mosque. She knew that wives of Mahomedans go to the mosque. She did not go because Abdul Hadee would not allow her. None of the female members of the Mahomedan community visited her, nor did she visit them. She never saw Hadjee Hossain or any of Abdul Hadee's male relatives. At the end of about a year and a half, when she was far gone in pregnancy, she went back to her

mother's home in Mangi. She was confined there of a baby whom she identifies as the present appellant. When the child was born she sent a message to Abdul Hadee to tell him of the birth. His answer was that he was busy and could not come. He sent however money for expenses, and he sent a message to her parents to look after her. On two occasions afterwards he went to Mangi to visit her, returning to Rangoon in the evening. The first visit was about six months, the second about twelve months, after the birth of the child. On the first occasion Mah Thai says she saw Abdul Hadee alone but nothing in particular was said. He wrote on a piece of paper a Mahomedan name for the child. Afterwards for fear it would be lost it was copied on a palm leaf The name was never used. The paper and the palm leaf have disappeared. But Mah Thai says the name was "Abdul Razack" and that name has been reproduced or adopted in connection with this claim. On the second occasion, according to Mah Thai's statement, Abdul Hadee wanted to take the child to Rangoon, and wanted her to go with him. She said she was not well yet and that the child was not old enough. That was the last occasion on which Mah Thai saw Abdul Hadee. So far as appears she never even heard from him or of him afterwards. He was at the time apparently in prosperous circumstances, but he made no provision for her or for the child, and he left the child to be brought up as an unbeliever without so much as performing the primary rite of his religion. Mah Thai was very badly off, but she never applied to her alleged husband for assistance, nor did she make any attempt to see him, though she knew where he lived, and he had, she said, been kind to her while they cohabited together, and she liked her life with him. At the end of two years, or four years as she says in one place, she married a Burman by whom she had seven children. Then she divorced him, and at the time of the trial she appeared as the wife or partner of a fourth consort.

Abdul Hadee continued to reside in Rangoon for a good many years, paying occasional visits to Calcutta. After a time he met with reverses and left Rangoon altogether. The last years of his life he spent at Calcutta, living as a pensioner on the bounty of his brother, Hadjee Hossain.

The child was brought up by Mah Thai's parents who were in humble circumstances. As "Moung Hpay," which was the name

they gave him, he lived till he was about thirty-five, with no higher aims or aspirations than those of an ordinary Burmese present. When the heirs of Hadjee Hossain were wanted, he was discovered in the jungle at Mangi by some enterprising gentlemen at Calcutta who took the matter up as a speculation. They put him forward as the missing heir, and "Moung Hpay" has become an *alias* for "Abdool Razack." Their interest in the success of the claim is at least a guarantee that no stone has been left unturned to enable the case to be presented in as favourable an aspect as possible.

In the course of the argument Mr. Wheeler the Judicial Clerk of the Privy Council referred their Lordships to a case decided by the special court of British Burma in 1875. It is to be found at page 75 of Mr. Christopher's Collection of Circular Orders and Judgments, published under the authority of the Judicial Commissioner in 1881. The opinion delivered by the court throws so much light on the practice relating to mixed marriages in Burma, and the position held by the wife and children when there is a lawful marriage, that it will not be out of place to quote a passage from it. After stating as a matter apparently not open to controversy that in order to constitute a valid marriage between a Mussulman and a Burmese woman, the woman must first apostatize and embrace Islam, the judgment proceeds as follows:—

"In a country like this, where a large number of Mahomedans from other countries have taken up their residence, and in very many cases their permanent abode, and when the natives have no race prejudices against alliances with foreigners, and whose religion offers no impediment to such, we find these mixed marriages everywhere existing among them, which have been duly celebrated according to Mahomedan rites; the wife having previously renounced her own religion and embraced that of her husband. Such an alliance is not regarded by either party as one of a temporary character, or in any way partaking of concubinage such as the liaisons which at one time prevailed here between Europeans and the women of the country, but as formal and a binding marriage. It only requires a short experience of this country to know that these marriages are regarded amongst the Mahomedan community as being of as binding a character, and as

conferring on the wife as honorable a position in the family as if she had been of Mahomedan descent: for she holds the same position as the husband's other wife does, if he happens to have another. The offspring likewise of these marriages are brought up in the Mahomedan faith, and are acknowledged by their father as his legitimate children, and at his death share in his property as such. The Burmese wife also takes the wife's share, if she is the only one, or divides it with the other or others as the case may be; and these rights both as regards the children and wife are recognized by our courts."

If this be a correct description of the position of a Burmese woman lawfully married to a Mahomedan settler in Rangoon it certainly would require a very violent presumption in favour of marriage to enable the court to hold that Mah Thai regarded the ceremony which preceded their cohabitation in the light of a lawful and binding marriage. On this point their Lordships are glad to find themselves entirely in accord with the court below.

The only question remaining for consideration is the question of acknowledgment, with which the learned Recorder dealt in rather summary way. The learned counsel for the respondent did not deny that Abdul Hadee might have married Mah Thai, as no doubt he might have done if she had embraced Islam, nor did they contend that the intercourse between Abdul Hadee and Mah Thai was of such a character as to prevent the possible legitimation of the offspring. Their contention was that there was no acknowledgment in the legal and proper sense of the word, although there may have been an admission of paternity.

The learned counsel for the appellant cited various texts, which taken apart from the context would seem to show that any admission of paternity, though made casually and not intended to have a serious effect, would be sufficient to confer the status of legitimacy. It is not in their Lordships' opinion necessary to examine these ancient authorities, or to inquire how far they are applicable to a state of society very different from that which existed at the time when they were promulgated. Their Lordships are bound by the decision of this Board which is clear upon the point. The question arose in the case of *Ashrufood Dowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan* (11 Moore's Ind. App., 113). There it was

contended that the claimant, who was defendant in the suit and respondent on the appeal, had been acknowledged by his putative father. The fact of acknowledgment was denied by the appellant. And a deed of repudiation was set up, in which the father expressly repudiated the claimant as his son. An issue was framed in these terms. "Has the deed of repudiation the effect of cancelling previously acknowledgment of defendant's legitimacy, if such were made?" In the course of their judgment (p. 104) their Lordships comment upon that issue. "It was," they said, "very correctly framed. It substitutes for the ambiguous word 'sonship,' which might include an illegitimate son, the word 'legitimacy,' and uses the word 'acknowledgment' in its legal sense, under the Mahomedan law, of acknowledgment of antecedent right established by the acknowledgment on the acknowledger, that is, in the sense of a recognition, not simply of sonship, but of legitimacy as a son." It is clear that it is in that sense that the term "acknowledgment" is used in a later passage of the judgment which has often been cited, where their Lordships say "a child born out of wedlock is illegitimate; if acknowledged, he acquires the *status* of the legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment expressed or implied, directly proved or presumed."

It cannot be contended that there was any acknowledgment of legitimacy in the present case. The so-called acknowledgment, even if the evidence on the part of the appellant is accepted as true in every particular, comes to nothing more than an admission of paternity which was not intended to have the serious effect of conferring the status of legitimacy. A witness is produced who says he accompanied Abdul Hadee on his second visit to Mangi, and that Abdul Hadee told him that he was going to see his son. And there is some other evidence to the like effect. Then there is some evidence that Abdul Hadee, though he had no property, left a will, bequeathing everything to his brother Hadjee Hossain, in which he mentioned that he had offspring in Burma. According to one witness he named the offspring as "Abdul Razack," and expressed a wish that his brother should give him "something." The will it seems was sent to Hadjee Hossain, but it is not forthcoming, nor was it acted upon. Assuming however every word that is said about it to be perfectly true, the evidence falls very far short of

such an acknowledgment as would confer the status of legitimacy upon an illegitimate child.

Their Lordships therefore in the result agree with the learned Recorder in thinking that the appellant's claim fails, and they will humbly advise Her Majesty that the appeal must be dismissed with costs.

IN THE PRIVY COUNCIL.*

Present :—Lord Hobhouse, Lord Ashbourne, Lord MacNaghten and Sir Richard Couch.

Bala Gouri Vallabha Tevar ... ... Appellant.

v.

Periasami *alias* Udayana Tevar. Respondent.

[On appeal from the High Court at Madras.]

Grant—Fraud—Lapse of time—Knowledge of fraud.

When the plaintiff seeks to recover a Zamindari on the ground that by the fraud of the defendant predecessor in title in 1802 the Sunnud which should have been conferred on the plaintiff predecessor had been granted to the former, the plaintiff has no subsisting cause of action as the alleged fraud must have been known to the plaintiff's predecessor in interest since that date. Bala Gouri Vallabha Tevar *v.* Periasami.

This was an appeal against the judgment and decree of the High Court of Judicature at Madras.

The facts of the case will appear sufficiently from the judgment of their Lordships which was delivered by

Lord Hobhouse :—This case appears to their Lordships to be a very simple one. The appellant contends that by a fraud alleged to have been committed in the years 1802 and 1803 by Gouri Vallabha Tevar, a *Sunnud* appointing him Zamindar of Shivaganga was granted to him by the Government in 1803, whereas it should have been granted to his elder brother Woya Tevar. But Gouri Vallabha Tevar entered upon the Zamindari at that time, and he and his descendants have enjoyed it ever since.

* 20th April 1894.

It is quite clear that there could have been no secrecy about his appointment to be Zamindar. The matter was the subject of public proclamation, and Woya Tevar must have known, and all his descendants must have known, that the *sunnud* granting the Zamindari was in the name of Gouri Vallabha Tevar, and that the Zamindari was actually occupied and enjoyed by Gouri Vallabha Tevar and his descendants.

No suit can be brought forward at the present time to re-open the question, and their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Velu Pillai and others ... Appellants (*Plaintiffs.*)*

v.

Ghose Mahomed Rowthar and others } Respdts. (2nd *Deft.* and his representatives.)

Limitation Act XV of 1877, Sch. II, Art. 85—Mutual account.

Velu Pillai. *v.* Ghose Mahomed.

An account is mutual within the meaning of Art. 85 of the Limitation Act when there are transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other side being merely complete or partial discharges of such obligations.

To constitute an account mutual, it is not necessary that there should be a shifting balance from time to time, but it is a possible and likely incident of the mutual transactions.

The general rule as to costs is where a plaintiff recovers a less amount than he claimed in the plaint they should be apportioned to the sum recovered and not to the sum claimed.

Appeal against so much of the decree of the District Judge of Trichinopoly in Original Suit No. 33 of 1890 as held that the amounts prior to 3rd November 1887 are barred.

Plaintiff sued for the recovery of a sum of money as upon a mutual and current account the last entry in the account being dated the 30th May 1889. Defendant pleaded, *inter alia,* limitation as to the amounts advanced prior to the 20th October 1887,

* A. S. No. 89 of 1892. 5th October 1893.

the plaint having been presented on the 20th October 1890. The District Judge held that the account was not mutual and gave a decree merely for the sums advanced from the 3rd November 1887, crediting the payments made first in discharge of the amounts barred and afterwards *pro tanto* in discharge of the amounts subsequently lent. The plaintiff appealed against so much of the decree as disallowed certain amounts as barred.

T. Rama Row for appellants.

T. Ranga Chariar for respondents Nos. 2, 3 and 6.

JUDGMENT:—The only point argued in this appeal is as to the correctness of the judge in holding that the account on which plaintiffs rely is not a mutual account within the meaning of Art. 85 of Schedule II of the Limitation Act.

The reason assigned by the District Judge is that with one trifling exception, and that beyond the period of limitation, the account has been invariably in favor of plaintiffs. He says, "although it may not be necessary in order to bring the case within Art. 85 of Act XV of 1877 that there should be actual demands, it is necessary that the balance should fluctuate, being at times in favor of one party and at times in favor of the other," and in support of this proportion he refers to *Narrandas Hemraj* v. *Vissandas Hemraj*, I. L. R, 6 B, 134 and *Hajee Syud Mahomed* v. *Mussamut Ashrufoonnissa*, I. L. R, 5 C, 759.

In the former case it was said by *Sir Charles Sargent, C. J.*, that the corresponding clause of Act IX of 1871 appeared to have been intended to apply to "cases where the course of business has been of such a nature as to give rise to reciprocal demands between the parties, in other words, where the dealings between the parties are such that sometimes the balance *may be* in favor of one party and sometimes of the other." The meaning of which is not that there must have been such a shifting balance, but such was a possible and likely incident of the mutual transactions with regard to which the account was kept.

The case in I. L. R, 5 C, 759 is authority for the proposition that the mere fact of the balance having been in favour of the defendant on some occasions is not sufficient to constitute the account a "mutual, open and current account."

A shifting balance may, no doubt, be a test of mutuality, but its absence cannot be taken to be conclusive proof against mutuality.

The reason assigned by the judge for his finding is therefore not valid; but, his decision is correct. The rule to be applied is to be found in the judgment delivered by *Mr. Justice Holloway* in *Hirada Basappa* v. *Gadigi Muddappa*, 6 M. H. C. R, 142, at p. 144. "To be mutual there must be transactions on each side *creating independent obligations on the other,* and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations." The amounts credited to defandant in the account kept by plaintiffs in the present case are merely payments made in reduction of the debt due from defendants to plaintiffs, and the two entries of amounts due to defendants from plaintiffs for oil, &c., purchased from defendants are also credited merely as items received in partial discharge of defendant's debt to the plaintiffs. We cannot accede to the contention that they are evidence of reciprocal demands. They are casual merely and not such as would imply a regular course of reciprocal dealings.

The Lower Court's decision is, therefore, correct and this appeal must be dismissed with costs.

Objection has been filed by respondent against that part of the Lower Court's decree which awards to plaintiff's costs on the whole amount sued for, instead of limiting the same to the amount decreed. The general rule is that if a plaintiff recovers a less amount than he claimed in the plaint, his costs should be apportioned according to the amount recovered and not to the sum claimed· *Madhan Mohan Doss* v. *Gopal Doss,* 10 M. I. A, 563. The judge has given no reason for departing from this rule. The decree will be modified by awarding costs to plaintiffs only on the amount decreed. The circumstances of the case are such as to justify disallowance of costs to the 2nd defendant, respondent.

In allowance of this objection the Lower Court's decree will be modified as above.

There will be no order as to costs of this memorandum of objections.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Linga Reddi ... ... Appellant (4th *Deft*).*

v.

P. Sama Row and others ... { Respdts. (*Plff.* and 1st to 3rd *Defendants*).

Linga Reddi *v.* Sama Row

Transfer of Property Act IV of 1882, S. 68, Cl. (c)—Usufructuary mortgage—Charge for damages—Merger—Subsequent deed including prior mortgages.

Although, according to the terms of a usufructuary mortgage the money for redemption of prior mortgages and recovering possession of the mortgaged property may be left with the mortgagee and the mortgagor might have to take no active part in delivering possession to the usufructuary mortgagee, where it is found that owing to the combined action of the mortgagor and a prior mortgagee, the usufructuary mortgagee is unable to get possession, he is according to the spirit though not the terms of S. 68 of the Transfer of Property Act entitled to sue at once for the money instead of for possession of the land and notwithstanding the fact that the time for payment has not expired.

Where the usufructuary mortgagee is entitled to the usufruct of the land in lieu of interest at 10 per cent. per annum, damages amounting to interest at 10 per cent. may also be charged on the property in a decree for the money.

A prior mortgagee who takes subsequent to the usufructuary mortgage a fresh mortgage bond including the amount of prior mortgages, does not thereby lose his priority.

Appeal against the decree of the District Judge of South Arcot in Original Suit No. 19 of 1890.

The facts of this case are fully stated in the following judgment of *Best, J.*

V. Bhashyam Aiyangar and *V. Krishnaswami Aiyar* for appellant.

C. R. Pattabhirama Aiyar for respondent No. 1.

Bhashyam Aiyangar:— The suit is upon a usufructuary mortgage: There is no doubt a covenant to pay at the end of three years; but that term has not expired. The suit should therefore be regarded as purely upon a usufructuary mortgage. Section 67 of Act IV of 1882 bars a suit for sale. And S. 68 gives no right of action. Clause (*a*) does not apply because this is not a suit upon the covenant. Clause (*b*) does not apply as the execution of a subsequent mortgage by the mortgagor in favour of the 4th defendant cannot amount to a deprivation of the whole or part of the mortgagee's security, *vide Jhabbu Ram* v. *Girdhari Singh,* I. L. R, 6

* A. S. No. 115 of 1891. 18th January 1894.

A, 298. Clause (c) does not apply as the mortgagor had not to deliver possession to the mortgagee but the latter had to obtain it on redemption of prior mortgages for which a portion of the consideration for the plaint mortgage was retained in the hands of the mortgagee himself. The last clause of the section has no application as the mortgaged property has not been destroyed or the security rendered insufficient. Again plaintiff as a second mortgagee cannot bring a suit for sale. He can only sue for redemption of the prior mortgage. See *Mata Din Kasodhan* v. *Kazim Husain,* I. L. R, 13 A, 432. Moreover, even if a suit for the mortgage-money could be brought under S. 68 the plaintiff could be entitled only to a simple money decree and not one against the property. Section 68 does not say that the mortgagee can sue for sale. Section 67 only authorizes it but only in the event of the mortgage money having become payable *under the contract.* Plaintiff can therefore get only a money decree, see *Samayya* v. *Nagalingam,* I. L. R, 15 M, 174 at page 178, which is exactly in point. Lastly, plaintiff says in the plaint and in his deposition that out of the consideration, he had reserved at the date of plaint the sum of Rs. 3,000 for payment of prior mortgagees. He could only have paid Rs. 1,500 on foot of the mortgage whatever sums he might have advanced to defendants Nos. 1 and 2 on their personal credit. He cannot ask for a decree against the property for all sums he has lent to these defendants but only for amount lent on foot of the plaint mortgage which on the date of the plaint cannot be more than Rs. 1,500. Plaintiff is also not entitled to a charge for the value of the profits he might have had if he had been placed in possession. He could get them only by way of damages.

Pattabhirama Aiyar :—This is not a usufructuary mortgage simply. There is a covenant to pay. Section 67 does not in such a case bar a suit for sale. The plaintiff is clearly entitled to sue as the court below finds that the mortgagor colluded with the 4th defendant and thereby prevented the plaintiff obtaining possession. Section 68 clearly gives a right of suit for the mortgage-money. The mortgage-money having thus become payable under S. 67, a suit for sale lies. Appellant's contention that a puisne mortgagee could only sue for redemption is opposed to the Madras cases, *Vencatachella Kandian* v, *Panjanadien,* I. L. R, 4 M, 213, *Gangadhara* v. *Sivarama,* I. L. R, 8 M, 246. The case in I. L. R,

13 A, 432, has not been followed here. See also the dissenting judgment of *Mahmood, J.* Section 96 of Act IV of 1882 clearly implies such a suit as the present. On the facts it is clear that the money has been advanced. The distinction attempted to be drawn that the sums have not been advanced on foot of the mortgage runs counter to the evidence.

Bhashyam Aiyangar (in reply) :—S. 96 does not imply that there can be a suit for sale subject to a prior mortgage. In a redemption suit the court has power to make an order for sale. See S. 92. Such an order for sale subject to a prior mortgage is what is referred to in S. 96. The cases in I. L. R, 4 M, 213 and I. L. R, 8 M, 246 are not upon the Transfer of Property Act and they do not decide expressly the question dealt with in I. L. R, 13 A, 432.

JUDGMENT :—*Best, J.*—The suit out of which this appeal has arisen was instituted by one P. Sama Row (now 1st respondent) against Ranga Row, his son Janakirama (a minor) and brother Ragava Row (defendants Nos. 1, 2 and 3 respectively) as executants of the mortgage bond A (dated 10th July 1890), the other defendants in the suit being Linga Reddi (the present appellant) and three others holding prior mortgages over portions of the property mortgaged to plaintiff under A.

Plaintiff's case was that of the Rs. 4,500 for which A was executed, Rs. 3,000 were left with him for redemption of the prior mortgages, and for payment to other creditors of defendants Nos. 1 to 3, but that his attempts to discharge the prior mortgage debts were frustrated by the machinations of the 4th defendant (now appellant) who induced defendants Nos. 1 to 3 to execute to himself on the 16th September 1890 a usufructuary mortgage of the property for Rupees 2,750 and to put him in possession of the property. Hence plaintiff's suit to recover from defendants Nos. 1 to 3 and on the responsibility of the property mortgaged to plaintiff under A a sum of Rs. 2,256 paid by him to those defendants and certain creditors of theirs, up to 10th October 1890, with Rs. 450 as damages. Defendants Nos. 4 to 7 were included as defendants in consequence of their being in possession of portions of the properties.

First defendant's plea was that it was owing to plaintiff's failure to pay off the other mortgages that he was obliged to make other arrangements. Second and third defendants also pleaded adversely to the plaintiff, but it is unnecessary to consider their pleas for the purpose of this appeal.

Fourth defendant pleaded that plaintiff had no right to recover the money from the plaint property, as Exhibit A contained no pledge of the property. He also denied tender to him as alleged by the plaintiff. He further denied all knowledge of the payments alleged to have been made by plaintiff to and on behalf of defendants Nos. 1 to 3. He also denied the alleged collusion between himself and those defendants and insisted on his right as prior mortgagee for a sum of Rs. 1,250 and also under the usufructuary mortgage bond of September 1890 for the further sum of Rs. 2,750.

It is unnecessary to state the pleas of the other defendants as the present appeal is by 4th defendant alone.

The District Judge has found that a sum of Rs. 2,181 was advanced by plaintiff to defendants Nos. 1 to 3 and is a valid mortgage debt, but that of the property mortgaged under A a portion had previously been sold to 6th defendant under Exhibit XI and that the land so sold must be excluded from liability for the debt due to plaintiff. As for the damages claimed, the District Judge held interest at 10 per cent. per annum on the amount found to have been paid by plaintiff to be a sufficient award. He therefore passed a decree against 1st and 3rd defendants personally and against their shares of the mortgaged property for Rs. 2181, with interest thereon as above, 2nd defendant's share being held liable only for a portion of the debt and that only in case it is not satisfied out of the 1st and 3rd defendants' shares. Fourth defendant has been held jointly liable with 1st and 3rd defendants for plaintiff's costs on the amount decreed to plaintiff, because the judge found the litigation to be due to the intervention of 4th defendant who "induced 1st and 3rd defendants to abandon their mortgage to plaintiff and give him one instead."

The present appeal is, as already observed, by 4th defendant, the respondents being plaintiff and defendants Nos. 1 to 3.

The points urged at the hearing are :—(1) that as a usufructuary mortgagee, plaintiff is not entitled to sue for sale of the

property; (2) that the suit is premature as under A the money is not repayable till after the expiration of three years; (3) that plaintiff is entitled to sue only for possession of the property and redemption of prior mortgages; (4) that S. 68 of the Transfer of Property Act is not applicable; (5) that the amount claimed is excessive; (6) that the damages cannot be made a charge on the property.

It is true that Exhibit A allows three years for payment of the money, but the finding is that owing to appellants' machinations the plaintiff was unable to get possession of the property. S. 68 of the Transfer of Property Act provides that the mortgagee has a right to sue for the money, *inter alia,* where the mortgagee being entitled to possession of the property, the mortgagor fails to deliver possession to him or to secure the possession of it to him. No doubt in the present case the money for redemption was left with the plaintiff and the mortgagor had to take no active part in placing him in possession of the property and consequently the case is not one coming within the letter of the section, but there can be no doubt it is within the spirit of the rule contained therein; and as it was owing to the combined action of the mortgagors and appellant that the respondent (plaintiff) was unable to get possession of the property, the latter must be allowed to elect to sue at once for the money instead of for possession of the land, though no doubt a suit for possession was also open to him. I would therefore disallow the objections Nos. 1 to 4.

As to the 5th objection the judge's finding is supported by Exhibit L and the receipts referred to in para. 13 of the judgment.

As to the last objection, under the mortgage A plaintiff was entitled to the usufruct of the land in lieu of interest at 10 per cent per annum. It is this same interest that is awarded as damages. I think it has been rightly made a charge upon the property. As remarked by *Romer, J.* in the recent case of *Cradock* v. *The Scottish President Institution,* 69 L. T. J. (N. S.), 380 at p. 382,—to constitute a charge in equity by deed or writing, it is not necessary that any general words of charge should be used. It is sufficient if the court can fairly gather from the instrument an intention by the parties that the property therein referred to should constitute a security.

I would dismiss this appeal with costs.

Objection has been taken on behalf of 1st respondent (plaintiff), under S. 561 of the Code of Civil Procedure, to the part of the decree which directs the property to be sold subject to the mortgages evidenced by Exhibits IV, V, and VI. As these mortgages are of date prior to that under which this suit has been brought, the judge's decree is correct. The mere fact of the amounts due under these mortgages being included in the mortgage bond VII executed to 4th defendant by defendants Nos. 1 and 3 subsequently to the execution of A is no reason for holding that A is unaffected by them.

I would therefore dismiss 1st respondent's objections also with costs.

Muthusami Aiyar, J :—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arthur J. H. Collins, Kt. Chief Justice and Mr. Justice Shephard.

Reference under Court Fees Act, S. 5.*

Reference under Court Fees Act, S 5.

Court Fees Act VII of 1870, Sch. 1—Valuation of appeal—Costs in lower court—Subject matter of dispute in appeal

When apart from and independently of any other reliefs which an appellant seeks in an appeal from a decree, he seeks relief on the ground that the costs of the proceedings terminating in the decree have not been properly assessed or apportioned by the decree, he makes the costs the subject matter of dispute and must pay stamp duty thereon.

Case referred under S. 5 of Act VII of 1870, by the Registrar and Taxing Officer of the High Court of Judicature, Appellate Side, Madras.

The case was stated as follows :—

"The question which has given rise to this reference is whether under certain circumstances costs awarded by the decree of a court should not be regarded as part of the 'value of the subject-matter in dispute' for the purpose of calculating the fees payable under Schedule I of the Court Fees Act on a memorandum of appeal against the decree.

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* Ref. Case No. 1 of 1893. 31st January 1894.

"There are two second appeals now pending admission, in which the point has been directly raised. The first of these arises out of Original Suit No. 24 of 1889 on the file of the Subordinate Court of Calicut. In this case the plaintiff sued 15 defendants to recover a paramba with mesne profits and damages, amounting to Rs. 368, and he tendered Rs. 30 as compensation for improvements. The Subordinate Judge gave a decree against 1st defendant (who alone contested the suit) for surrender and for payment of Rs. 136 as damages and mesne profits, but fixed the compensation for improvements at Rs. 140. The decree also directed the 1st defendant to pay the whole of plaintiff's costs.

"The 1st defendant appealed (in Appeal No. 1017 of 1890) to the District Court and took express objection to the order as to costs. The District Judge of South Malabar confirmed the decree except as to costs regarding which he ordered that each party should bear his own.

"Against this decree the plaintiff has presented a second appeal in which amongst other grounds he contends that 'the District Judge having accepted the findings of the Subordinate Judge that the 1st defendant was guilty of committing waste and of forging receipts should not have interfered with the Subordinate Judge's order as to costs' and that 'the plaintiff is under the circumstances at least entitled to proportionate costs.'

"The second case arises out of Appeal No. 338 of 1891 on the file of the Subordinate Court of North Malabar. In this appeal the Subordinate Judge reversing the decree of the District Munsif, who dismissed the suit with costs (Original Suit No. 72 of 1891 on the file of the District Munsif of Cannanore) gave a decree for plaintiff as prayed for with costs throughout, payable by 1st defendant. The 1st defendant has now preferred a second appeal of which one of the grounds is 'that under the peculiar circumstances of this case the Lower Appellate Court ought not to have decreed the payment of costs of this suit.'

"As a rule, costs decreed by a lower court are not computed as part of the subject-matter in dispute for the purpose of assessing court fees on an appeal, but when an appellant expressly questions the propriety of the order as to costs, when he treats the costs awarded as a matter separate and independent from the other

reliefs given by the decree and contends that even if the rest of the decree is upheld, the order as to costs should be modified in his favor, it is the practice in this office to add the amount of the costs in respect of which there is a contention to the value of the other matters in respect of which the appeal is made for the purpose of arriving at the total value of the 'subject-matter in dispute.' Each of the above two cases being of this nature the appellant has been called upon to pay court fee on the amount of costs disputed.

"Each urges that he is not liable to this payment on the general ground that costs form no part of the subject-matter in dispute. The authorities relied on for this contention are, *Doorga Doss Chowdry* v. *Ramanauth Chowdry*, 8 M. I. A., 262; *Nilmadhub Doss* v. *Bishumber Doss*, 3 B. L. R., 27; and High Court Proceedings, dated 10th November 1875, No. 2739.

"The first case cited was an application to the Privy Council to admit an appeal without a certificate from the High Court. The substantive amount of the decree was below the minimum limit at which an appeal was allowed by the rules, but for the appellant it was argued that he was entitled to add the costs awarded against him by the decree. Such addition would have brought the figure up to the minimum limit but the Privy Council held that 'the costs of a suit are no part of the subject-matter in dispute and cannot be used for the purpose' for which the appellant sought to use them. In the second case, *Nilmadhub Doss* v. *Bishumber Doss*, 13 M. I. A, 85 a similar opinion seems to be indicated though the necessity for deciding the point did not arise. The third authority is a proceedings of this High Court passed on a question referred by the Acting District Judge of South Canara as to whether 'when the objection taken by the respondent under S. 348 (561) of the Code of Civil Procedure has reference only to so much of the lower court's decree as disallows costs, any additional fee is payable under S. 16 of the Court Fees Act.' The court while pointing out that its answer was not authoritative stated in reply the opinion that no additional fee was authorized in the case referred, and quoted the dictum in the Privy Council case above cited, that costs are not part of the subject matter in dispute.

"This proceedings seems exactly in point supposing the expression 'subject-matter of the suit' used in S. 16 of the Court Fees

Act to be equivalent to 'subject-matter in dispute' used in Sch. I of the Act. The plaintiff obtained a decree as prayed for, but his costs were disallowed, and he appealed against that part of the decree disallowing his costs by putting in a memorandum of objections.

"My reasons for not accepting the decision as final however are, first, that the proceedings disclaims any authoritative force, and secondly, that the practice of the Registrar's Office has never been brought into conformity with the rule laid down. The Privy Council ruling cited in the Proceedings does not appear to be on all fours with the cases referred. In the case before the Privy Council it would appear that costs followed the result in the High Court, and consequently an appeal against the amount absolutely allowed by the decree involved an appeal against the order as to costs. In such cases it is not the practice in the High Court to reckon the costs in computing the value of the subject-matter.

"If costs are in no case to be regarded as part of the subject-matter in dispute it would seem to follow that costs ought not to be permitted to be made a separate and independent subject of appeal. But if a separate ground of appeal on the subject of costs is permitted, then the apportionment of costs might be the only question raised in appeal, and then on the construction contended for an appeal might be filed free from court fees.

"The point is of importance, since it is of frequent occurrence, and as there is some doubt in the matter I make this reference.

"The question for decision is as follows :—When apart from and independently of any other reliefs which an appellant seeks in an appeal from a decree, he seeks distinct relief on the ground that by the decree under appeal the costs of the parties in the proceedings which terminated with the decree have not been properly assessed or apportioned, should the value of such distinct relief be reckoned as part of 'the subject matter in dispute,' for the purposes of the first Schedule of the Court Fees Act, or should the said value be excluded from computation ?"

V. Ryru Nambiar for appellant.

The Ag. Government Pleader (*S. Subramaniem*) for respondent.

JUDGMENT :—The appellant has made the costs the subject-matter of dispute and therefore a court fee stamp is leviable

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Subramania Pandia Chokka Talavar ... Appellant (*Plaintiff*).*

v.

Siva Subramania Pillai and others ... Respondents (*Defendants.*)

Subramania Pandia Chokka Talavar *v.* Siva Subramania Pillai.

Limitation Act XV of 1877, S. 7, Illus. (*b*), Art. 45.—Transfer of minor's rights—Hindu Law—Impartible Zamindari—Succession—Survivorship—Half-brother's rights—Minor—Substantial representation—Act VIII of 1859.

Where the period prescribed for a suit by the Limitation Act is less than 3 years, S. 7 of the Act or illustration (*b*) does not give a minor 3 years after attaining majority to institute the suit, but only the period prescribed in the schedule computed from the date of attainment of majority. The intention of the section is to give the full period of 3 years after majority only when the period prescribed extends to 3 years or more and expires within 3 years from the date of majority.

Quære : whether the privilege conferred by S. 7 is personal to the minor or extends to adult transferees of the minor. *Mahomed Hossein* v. *Purundur Mahto*, I. L. R, 11 C, 287, and *Suryana* v. *Durgi*, I. L. R, 7 M, 258 referred to.

Article 45 of Sch. II. does not apply to suits to set aside a court sale in execution of a decree obtained against a minor represented by his guardian.

In the case of impartible coparcenary property under the Mitakshara, a brother of the half-blood, who is senior in age, succeeds in preference to a junior uterine brother.

Per cur: (1) The rule of decision in regard to succession to impartible property is to be found in the Mitakshara law applicable to partible property subject to such notifications as naturally flow from the character of the property as an impartible estate. (2) The only modification which impartibility suggests in regard to the right of successions is the existence of a special rule for the selection of a single heir when there are several heirs of the same class who would be entitled if it were partible (3) In the absence of a special custom the rule of primogeniture furnishes a ground of preference. (4) Nearness of blood is not a ground of preference with reference either to partible or to impartible property, as the principle of survivorship is the dominant one in such cases.

Katama Natchiar, v. *The Zamindary of Shivagunga*, 9 M. I. A. 539, *Naraganti Achamma* v. *Venkatchelapati*, I. L. R, 4 M, 150, *Jogendra Bhupati* v. *Nityanand*, L. R. 17, I. A. 128 relied on and followed. *Neelkisto* v. *Beerchunder*, 12 M. I. A. 523, *Sartaj Kuari* v. *Deoraj Kuari*, L. R. 15 I. A. 51, explained and distinguished.

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* A. S. No. 22 of 1891. 13th February 1894.

When, it is clear from the proceedings in a suit instituted under Act VIII of 1859 that the mother of a minor was impleaded as a defendant in order that she might act as his guardian, and did act as guardian, but she was not described as his guardian, held that the minor was substantially represented and the decree was binding on him.

The facts of this case appear sufficiently from the following judgment of the High Court.

T. Rama Row and *C. Ramachandra Row Saheb* for appellant.

V. Bhashyam Aiyangar for respondents Nos. 11 to 14 and 146.

T. Ranga Ramanujachariar for respondent No. 1.

S. Gopalaswami Aiyangar for respondents Nos. 137 and 152.

R. Ranga Row for respondent No. 7.

JUDGMENT :—This was a suit to recover the Mittas or estates called Peruruni and Karaikuruchi and the Pannai or home-farm lands thereon, which had formed part of the Zamindari of Maniachi, situated in the District of Tinnevelly. The Subordinate Judge of Tinnevelly who tried the suit dismissed it with costs. Appellant-plaintiff is the present Zamindar of Maniachi which is admittedly an impartible estate belonging to a joint Hindu family but capable of being enjoyed by but one member of the family at a time, and respondents are alienees who are in possession of the property in dispute.

The transactions which have given rise to this litigation are fully set forth by the court of first instance in paragraphs 25 to 57 of its judgment. The Subordinate Judge has also sufficiently stated the substance of the pleadings, the contentions of the several respondents, and the questions arising thereupon for determination, and we do not think it is necessary for us to recapitulate them in this judgment.

Of the fourteen issues recorded for decision, the 13th and 14th relate merely to improvements and mesne profits. To the decision on the first three issues, no exception is taken at the hearing before us. The 4th, 6th and 7th issues relate to preliminary grounds of objection urged against the suit whilst the other issues refer to the merits.

The first question for determination is that raised by the fourth issue, *viz.*, whether the suit is barred by the Act of Limitations. The facts from which it arises are shortly these. At the commencement

of the year 1866 and for some years before it, one Bhulokapandiya Chokka Talavar was the Zamindar of Maniachi and the properties now in dispute were then comprised in the Zamindari. He died on the 14th January 1866 leaving him surviving seven widows and five minor sons as shown in the subjoined pedigree.

Bhuloka Pandia Chokka Talavar,
Zamindar of Maniachi, who
died in January 1866.
His seven wives.

- No. 1. Kattama Talavachi (died childless).
- No. 2 Ramu Talavachi (died childless).
- No. 3 Udayanna Talavachi (died childless).
- No. 4 Rama Talavachi
  - son, Chokka Talavar No. 8.
- No. 5 Shanmukha Vadivu Talavachi.
  - Subrahmania Pandia Chokka Talavar No. 9.
  - Vellaya Pandian No. 10. (died unmarried).
  - Sendura Pandian No. 11.
- No. 6. Shanmukha Vadivu Talavachi
  - son, Subrahmania Pandia Chocka Talavar (*Plaintiff Appellant*) No. 12.
- No. 7 (died childless)

On the death of Bhuloka Pandia in 1866, the Government at first recognised as his lawful successor his son by the fourth wife, Chokka Talavar, No. 8 in the pedigree. He was, however, junior in years to the eldest son by the fifth wife, Subrahmania Pandia Chokka Talavar No. 9 in the pedigree. But the Government considered that his mother's prior marriage was a legitimate ground of preference. As he (No. 8) was a minor, the Court of Wards assumed management of the Zamindari under Reg. V of 1804. The late Zamindar's fifth wife then instituted O. S. No. 25 of 1866 on the file of the Civil Court of Tinnevelly disputing the action of the Government and asserting her eldest son's preferable claim by right of primogeniture. In May 1868 the Civil Court decreed in his favour. Meanwhile, the Government recalled their recognition of the junior son by the fourth wife and recognised in his stead the eldest son by the fifth wife, No. 9 in the pedigree, Subrahmania Pandia Chokka Talavar, and the Court of Wards since continued in management on his behalf.

Of the three sons by the fifth wife, the second son Vellaya Pandian died unmarried during his minority, and the eldest Subrahmania Pandia Chokka Talavar, the last recognised Zamindar

and lawful holder died during his minority in 1873 leaving him surviving one uterine brother named Sendura Pandian No. 11 in the pedigree and two half-brothers, Chokka Talavar No. 8 and the plaintiff-appellant No. 12 in the pedigree. It is an undisputed fact that of the three surviving brothers, the plaintiff is the eldest. It is also admitted that the Zamindari of Maniachi is an impartible estate belonging to a joint Hindu family constituted by its male co-parceners and that the last lawful Zamindar was appellant's and Chokka Talavar's half-brother, and the uterine brother of Sendura Pandian No. 11 in the pedigree.

Appellant rests his title to the Zamindari in this court as in the court below, on his position as the eldest of the surviving brothers of the last Zamindar, while the respondent's case is that the uterine brother Sendura Pandian excludes him from succession. With reference to this contention it was alleged for the appellant that Sendura relinquished his interest in the Zamindari, if any, in favour of the appellant by document C which bears date the 15th August 1885. The plaint which is dated the 9th June 1885 prayed for a decree (1) establishing appellant's right to the properties in dispute, cancelling the decree in Original Suit No. 14 of 1866 and the auction sale in its execution, and (2) awarding him possession of the properties mentioned in the plaint. It stated also that the decree and the execution sale were vitiated by fraud and that the circumstances constituting fraud came to appellant's knowledge only in March 1885. The decree in Original Suit No. 14 of 1866 was passed on the 4th May 1867 and the sales in execution of it took place on the 11th and 13th August 1870 and were confirmed by the Civil Judge on the 14th September 1870 by Exhibits M and P and LIV. The purchasers were placed in possession on 7th and 29th September 1870.

These are the facts which have to be borne in mind whilst dealing with the question of limitation with reference to the arguments addressed to us at the hearing. Treating this suit as one brought to recover immovable family property unlawfully alienated during appellant's minority, the Subordinate Judge has found that it is barred by limitation. He rests his opinion on the ground that appellant was born on the 5th May 1861 and completed his twenty-first year on the 4th May 1882 and not as alleged by him on 11th June 1882. It is urged on appellant's behalf that this finding is contrary to the weight of evidence.

The date of appellant's birth formed the subject of the 6th issue and the evidence cited with reference to it is partly oral and partly documentary. It must be observed that in the case of the appellant, no horroscope has been kept so as to throw light on the precise date of his birth. Both parties admit that appellant was in existence from the 12th June 1861, the contest being as to whether he was born on that date or as found by the Subordinate Judge on the 5th May 1861.

As regards the oral evidence, it is that of plaintiff's witnesses Nos. 4 and 25 and defendant's witnesses Nos. 11 and 12. The two former state that plaintiff was born in the month of Vaiyasi Andu 1036 corresponding to May—June 1861 and the two latter depose that the plaintiff's birthday star or lunar mansion was "Satayam" or the 24th lunar day or star in the month of Chittirai. Both the witnesses for appellant are related to him, the 4th being a distant relative and the 25th witness being his maternal uncle. The evidence of the maternal uncle is open to the observation that he is unable to remember the month and the year in which his own eldest and other sons were born, though he professes to recollect the month and year in which appellant was born. The evidence of the 4th witness is also open to the remark that the date of the temple festival at Tiruchendur in the District of Tinnevelly in the year 1861 with which he connects appellant's birth shows, (as explained by the Subordinate Judge) when it is computed from the calendar, that appellant was born on the 5th May and not on the 12th June.

On the other hand, respondents' 12th witness does not name the month in which special worship or Archani is performed in the Tiruchendur temple on appellant's Janma Nakshatram day or the day of his birth fixed with reference to the lunar asterism or mansion. According to respondent's 11th witness it is clear that the appellant's Janma Nakshatram or the star under which he was born was the "Satayam" or the 24th lunar mansion day in the month of Chittirari which corresponds to the 5th May 1861 according to the calendar. Respondents' witnesses are not connected with them. The Subordinate Judge describes the evidence at length in paragraph 21 of his judgment and comes to the conclusion that appellant was born on the 5th May 1861; and after carefully considering it, we see no reason to disturb his finding. In

the first place, respondents' 11th witness is a disinterested witness. The fact deposed to by him is in the nature of circumstantial evidence. It is a fact which he was in a position to remember from the Archanai or special service being performed every year on the same lunar day of the same solar month. It is corroborated by the date of the Tiruchendur festival in the year 1861 with which event the 4th witness connects appellant's birth. Respondents' 12th witness corroborates the 11th so far as the performance of a special service in the Tiruchendur temple on the Zamindar's birth day and the name of his Janma Nakshatram or the star under which he was born, are concerned.

On the other hand, the onus of showing that the suit was brought in time is on the appellant. Both his witnesses are related to him and their evidence is open to the observations mentioned above. The appellant's pleader suggests that his 4th witness may have made a mistake, but it is not likely. The allusion to the Tiruchendur festival as the event which enabled him to fix the month and star of appellant's birth appears to be natural.

The documentary evidence bearing on the 6th issue consists of two Exhibits H and XV. The former is a Takid sent on the 31st May 1882 by the Sub-Collector of Tinnevelly to the Tahsildar of Ottapidaram Taluk. It states that the Maniachi Zamindar attains his majority on the 12th June and directs the Tahsildar to close the accounts of the estate and be ready to deliver the Zamindari on the 13th June. Exhibit XV is the letter written by the Sub-Collector to the Collector on the same date and is to the following effect:—"It appears the eldest minor of the Maniachi estate has no horroscope and the exact date of his birth is not known. The Tahsildar on examining the previous records and on due enquiry approximately fixes the date on which the minor attains his age as the 12th June 1882. I propose to issue orders to the Tahsildar to make over the estate to the minor on the 13th proximo." The report of the Tahsildar to which reference is made in Exhibit XV is not before us. We cannot say that the Exhibits which name the 12th June 1882 approximately as to the date on which the appellant attained his majority are inconsistent with the finding that the actual date of birth was the 5th May 1861. It is then said that the Zamindari was actually made over to the appellant on the 13th June 1882, but this fact does not carry the

case further. No correspondence is produced from which we can infer that the real date of birth was ascertained by the Court of Wards and it was enough for that court that on the 13th June 1882 when they transferred the estate, the appellant had ceased to be a minor. The Subordinate Judge appears to us to have come to a correct finding as to the date of appellant's birth.

With reference to the latter part of the 6th issue, it is argued by respondents' pleader that under the Indian Majority Act IX of 1875, S. 3, the appellant should be treated as having attained his Majority on the completion of 21 years only in case he had lawfully been under the jurisdiction of the Court of Wards and that he must otherwise be treated as having attained his majority on the completion of 18 years. We shall presently consider the question whether Sendura Pandian excludes the appellant from succession and whether an uterine brother succeeds to an impartible estate in preference to a half-brother though the latter is senior in years to the former. Assuming, for the purpose of dealing with the question of limitation and for that purpose only, that the appellant was not only the *de facto* but also the *de jure* Zamindar, we see no reason to doubt the correctness of the Subordinate Judge's decision that appellant attained his majority on the completion of 21 years on the 4th May 1882.

There are three more matters in connection with which the question of limitation has been considered by the Subordinate Judge. Adverting to the prayer in the plaint that the decree in Original Suit No. 14 of 1866 and the sales, in execution of it, of the properties in dispute be cancelled, the Subordinate Judge observes that there is no doubt that as a suit to set aside court sales in execution of a decree to which appellant was a party, it must be governed by the one year's limitation prescribed by Article 12, Schedule II of the Act of Limitations. He adds, however, that as the plaintiff was a minor, a period of two years must, under illustration (*b*) attached to S. 7 of the Act, be added to the one year. It is argued on appellant's behalf that this is a misapprehension of the scope of the illustration and that the period of limitation prescribed by Art. 12 is applicable to minors as well as to adults.

That article premises a suit to set aside a sale in execution of a decree and prescribes as the period of limitation one year from the date on which the sale is confirmed. The case premised by illustration (*b*) of S. 7 is one in which the right to sue for a legacy accrues to A during his minority and A attains his majority 11 years after such accrual; he would have under the ordinary law one year remaining within which to sue, but under this section an extension of two years will be allowed him making in all a period of three years from the date of his attaining majority within which he may bring his suit. The Subordinate Judge considers that by reason of the illustration (*b*) a minor who is a party to a suit has three years to set aside a sale therein from the date on which he attains his majority. He relies in support of his opinion on *Mahomed Hossein* v. *Purundur Mahto*, I. L. R, 11 C, 287 and on *Suryanna* v. *Durgi*, I. L. R, 7 M, 258 but neither of them is in point. The question whether illustration (*b*) of S. 7 is an authority for giving a minor the right to sue to set aside a sale falling under Article 12 three years from the date on which he attains his majority though Article 12 prescribes only one year in the case of adults, was not raised or considered in those cases.

The illustration no doubt recognises the principle that when the period of limitation prescribed by the ordinary law exceeds three years but expires within three years from the date on which he attains his majority, the minor will have the whole period of three years from the date of his majority. But it does not warrant the inference that it gives three years in cases which are governed by Art. 12. If the minor were an adult at the date of the sale which he seeks to set aside he would have to sue within one year from the date of the confirmation of the sale; and on attaining his majority, he stands in the position of an adult and there is no reason why he should have three years instead of one year from the date of majority. Section 7 ought to be read together with each Article in the second schedule, and when the period prescribed by the latter extends to three years or more and expires within three years from the date of attainment of majority, the intention is that the late minor should have the full three years. But when the period of limitation prescribed by the schedule, as for instance by Art. 12, is less than three years and the minor has that period from the date of his majority, we see no warrant for holding that

the intention was to enlarge the period of limitation prescribed by the schedule to three years. We are unable to adopt the view of the Subordinate Judge that the appellant had more than one year to set aside the court sales if he were a party to Original Suit No. 14 of 1866.

In paragraph 147 of his judgment, the Subordinate Judge observes that as a suit to set aside the decree in suit No. 14 of 1866 for fraud, the suit is governed by Art. 95 which allows the appellant a period of three years from the date on which the fraud came to his knowledge. As he finds, however, that no fraud has been proved, the question does not arise in this case and we shall consider in connection with the merits whether this finding is correct.

The Subordinate Judge also refers to Article 44, though he considers it to apply only to voluntary sales. But, for the appellant, it is contended that, by analogy to that Article, he is entitled to sue to set aside, within three years from the date of his majority, an improper court sale which took place during his minority with the privity of his guardian. We cannot accede to this contention as Art. 12 must be read together with Art. 44 and there can be no true analogy when there is an express provision to the contrary. With Arts 12 and 144 before us, we do not think that Art. 120 which presupposes the absence of a special provision applicable to the case under consideration can apply. The conclusion we come to on the 4th issue is that the present suit is time-barred as a suit falling under Art. 144 or Art. 12 and that either Art. 120 or 44 or 45 has no application.

In dealing with the question of limitation it was assumed that appellant was a party to Original Suit No. 14 of 1866 by his guardian and that as the eldest surviving brother though of the half blood he is lawfully entitled to the Zamindari. We now proceed to consider these questions.

The question raised by the 5th issue is, whether appellant is entitled to the Zamindari of Maniachi in preference to Sendura Pandia Talavar who is still alive. The facts upon which it arises for determination are, (1) that the Zamindari is an impartible estate, (2) that it belongs to the co-parcenary family consisting of the appellant and his brothers, (3) that the *propositus* was

Subramania Chokka Talavar, No. 9 in the pedigree who died without male issue, (4) that Sendura Pandian is his uterine brother, whereas appellant is only his half-brother; and (5) that the latter is older than the former and is the eldest of the surviving sons of Bhuloka Pandia Chokka Talavar. It is admitted that Subramania Chokka Talavar was the eldest son of the previous Zamindar and that he succeeded his father by right of primogeniture, no special custom being alleged by either party as controlling the right of primogeniture in case of disputed succession to the Zamindari. The point for consideration is whether, under the Mitakshara law, nearness of blood is a ground of preference as between brothers of the half and full blood in case of disputed succession to impartible co-parcenary property.

The Subordinate Judge decides it in the affirmative, but in that opinion we are unable to concur. Apart from authority we are of opinion that on general principles the question should be answered in the negative. The first of them is that a rule of decision in regard to succession to impartible property is to be found in the Mitakshara law applicable to partible property, subject to such modifications as naturally flow from the character of the property as an impartible estate. The second principle is that the only modification which impartibility suggests in regard to the right of succession, is the existence of a special rule for the selection of a single heir when there are several heirs of the same class who would be entitled to succeed to the property if it were partible under the general Hindu Law. The third principle is that in the absence of a special custom, the rule of primogeniture furnishes a ground of preference. In determining who the single heir is according to these principles, we have first to ascertain the class of heirs who would be entitled to succeed to the property if it were partible, regard being had to its nature as co-parcenary or separate property, and we have next to select the single heir by applying the special rule indicated above.

Applying the principles mentioned above to the case before us, there can be no doubt that if the property in dispute had been the separate property of the last lawful Zamindar from whom succession has to be traced, the uterine brother would be preferred to the half-brother. In enumerating the classes of heirs to separate property with reference to the Smriti of Yagnavalkya cited in

Mitakshara, Chapter II, Section I, Sloka 2, the Commentator observes in Chapter II, S. 4, Sloka 5, that "among brothers, such as are of the whole blood take the inheritance in the first instance" under the text already cited, "to the nearest sapinda, the inheritance next belongs, since those of the half blood are remote through the difference of the mothers." Vignanesvara Yogi proceeds then to state in S. 6 that "if there be no uterine brothers, those by different mothers inherit the estate, and adds in S. 8 that in case of competition between brothers and nephews, nephews of the whole blood have no title to the succession in preference to brothers of the half blood," for their right of inheritance is declared to be on failure of brothers. If the Zamindari of Maniachi, from which the property now in litigation was severed by court sales, had been the separate or self-acquired property of Subramania Talavar, Sendura Pandiya, his uterine brother, would certainly have succeeded to it in preference to the appellant who is his brother by a different mother. The principle which determines the class of kindred entitled to succeed is that, in case of disputed succession to such property, remoteness of blood furnishes a rule of exclusion. This being so, the further question arises whether the same principle applies when the property is the coparcenary property, though impartible, belonging to a joint Hindu family consisting of the deceased Zamindar and his brothers. Looking again to the Mitakshara law of succession as applied to partible coparcenary property, the right of survivorship is mentioned as a dominant right which controls the rule of succession applicable to separate property. In Chapter II, S. 1, Sloka 20 of the Mitakshara, the Commentator premises a case of competition between the coparceners and widows of a deceased person, refers to the text of Narada "let them allow a maintenance to his women for life," and concludes that the widows are entitled only to maintenance, the co-parceners being entitled to the property. It follows that in case of co-parcenary property, the doctrine of survivorship furnishes an additional rule whereby the class of heirs has to be found. It is also a controlling or dominant right for the reason that, according to Hindu theory, co-parcenary property belongs to the co-parcenary family, that though co-parceners are tenants in common, they have no specific property, but only an interest which may ripen into specific property on partition, and that if the existing co-parceners die without male issue, they are to be treated as

if they had never been born and as if the partible property actually belonged to the body of co-parceners who are alive at the time of partition. When therefore partible property belongs to a coparcenary family and when a co-parcener dies without male issue, leaving one uterine brother and one half-brother surviving him, the half-brother is entitled to share the property equally with the uterine brother at the time of partition, the deceased brother being considered as if he never had been born, and the property being treated as always vested in the family as a unit, and as never absolutely vested for purposes of inheritance in any one co-parcener in preference to another, how muchsoever the family may change as to the number of co-parceners from time to time during co-parcenary. To say, therefore, that nearness of blood is a ground of preference in such cases would be tantamount to ignoring the pre-existing coparcenary interest of half-brothers. Nearness of blood being thus no ground of preference under the Mitakshara law in case of disputed succession to co-parcenary property when it is partible, it is likewise no ground of preference, when such property is impartible. It is conceded that the Zamindari belongs to the coparcenary family consisting of all the brothers of the *propositus* and the nearest class of kindred in which the single heir ought to be found is that of brothers, whether of the whole or half blood, and applying the rule of primogeniture as a subsidiary rule of selection, since there is no specific custom, the brother that is entitled to the Zamindari is the eldest in years, *viz.*, the plaintiff or appellant.

This view is in accordance with the course of decisions to which our attention has been called at the hearing.

The first is the Sivaganga case reported in 9 M. I. A, 539, *Katama Natchiar* v. *The Rajah of Shivagunga*. The point decided in that case was that the Zamindari of Sivaganga was the self-acquired property, of Gouri Vallabha Tevar, the prior lawful Zamindar, that the competition being between his daughter and brother's son, there was no right of survivorship as in the case of co-parcenary property, and that according to the ordinary rule of succession, the class of kindred among whom the single heir was to be found was represented by the daughter and not by co-parceners. The question now in dispute did not arise in that case but there are observations made by the Privy Council which

indicate the principles that should guide our decision in this case. Their Lordships say there are two principles on which the rule of succession according to the Hindu law appears to depend. The first is that which determines the right to offer the funeral oblation and the degree in which the persons making the offering are supposed to minister to the spiritual benefit of the deceased; the second is the right of survivorship. It is generally intelligible that upon the principle of survivorship the right of the co-parceners in an undivided estate should prevail. Their Lordships say further that in co-parcenary property according to the principles of Hindu law, there is coparcenership between the different members of a united family and survivorship following upon it; for there is community of interest and unity of possession between all the members of the family and upon the death of any one of them, the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession. But the law of partition shows that as to the separately acquired property of one member, the other members of that family have neither unity of interest nor unity of possession and the foundation, therefore, of a right to take such property by survivorship fails. It is said that these observations are in the nature of *obiter dicta,* but if so, they are the *dicta* of the highest judicial tribunal for India followed in several later cases. Moreover the two main principles of succession mentioned above are those embodied in the text of Manu, "that the inheritance belongs to the nearest sapinda" and in the text of Narada to the effect that in an undivided family, the brother takes the co-parcenary property in preference to the widow.

The second case is what is known as the Tipperah case reported at 12 M. I. A, 523, *Neelkisto Deb Burmons* v. *Beerchunder Thakoor.* That was a suit in the nature of ejectment brought by a brother of the half-blood against the uterine brother on the ground that as he was the eldest of the class of heirs from whom a Jobraj should be selected according to family custom, the appointment by the deceased Zamindar of his younger brother, the then defendant, as Jobraj, was invalid. The Privy Council held that the appointment was valid by family custom or Kulachar which imposed no restriction on the power of the reigning Raja to appoint a Jobraj from among his kindred. On this point, the

Lords of the Judicial Committee remarked that "where there is evidence of a power of selection the actual observance of seniority even in a considerable series of successions cannot of itself defeat a custom which establishes a right of free choice; and had the instances been uniform and without exception, that alone would have been sufficient to support the appellant's case. Such uniformity of practice was however not proved, for, several instances appear of infants appointed to the office of Jobraj, whilst relatives within the custom and older in years were living. It is this finding of fact that was the *ratio decidendi* but the decision is an authority for the proposition that in determining the right of succession to an impartible estate, we should first ascertain the class of kindred from whom a single heir is to be selected, next see whether family custom or Kulachar discloses a special rule of selection, and that in default of such custom, seniority of age constitutes a title by descent to the impartible estate by analogy to general Hindu law. The Judicial Committee say further that by general Hindu law, the uterine brother would be the heir in preference to the half-brother, were it a disputed succession to divided property.

This limitation is also in accordance with the text of the Mitakshara in Chapter II, S. IV, Slokas 5 and 6 and is an authority for the proposition that in case of disputed succession to impartible property which was acquired by or belonged exclusively to the deceased Zamindar, nearness of blood is a factor to be considered in determining the class of kindred from whom the single heir has to be selected. Respondents' pleader lays considerable stress on the passage in the judgment of the Privy Council which deals with the contention on behalf of the appellant in the Tipperah case, to the effect that the preference of the whole to the half-blood does not extend to a Raj and that, when the estate is ancestral and undivided, brothers of the whole and half-blood are on the same footing. Their Lordships observe as follows :—"When a Raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction, involving also a contradiction to call this seperate ownership, though coming by inheritance, at once sole and joint ownership and so to constitute a joint ownership without the common incidents of coparcenership. The truth is, the title to the throne and to the royal lands is, in this case, one and the same title. Survivorship

cannot obtain in such a possession from its very nature and there can be no community of interest; for, claims to an estate in lands and to rights in others over it, such as to maintenance, are distinct and inconsistent claims. As there can be no survivorship, title by survivorship, when it varies from the ordinary title by heirship, cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed and which passes by inheritance to a sole heir." It is further argued on behalf of the respondents that the doctrine of survivorship as a dominant right has no operation as well in the case of impartible co-parcenary as in the case of impartible separate property and that we are not at liberty to introduce a distinction so as to vary the ordinary rule of succession which it is contended applies alike to both. We are unable to accede to this suggestion for several reasons. In the first place, later decisions of the Privy Council recognized survivorship as a material factor when the impartible estate is co-parcenary property. In the next place, the Tipperah estate is situated in a part of India governed by the Dayabhaga School of Hindu law which explains away the Smriti of Narada as inapplicable to married women and denies a place to the doctrine of survivorsoip in its scheme of succession. It may be as suggested by Mr. Bhashyam Aiyangar on respondents' behalf, that when the Tipperah case was decided by the Privy Council, there was an impression at Calcutta that, even under the Dayabhaga law, there was survivorship as an exception to the general scheme of inheritance in the case contemplated by Jimutavahana in Verse 34, S. 5, Chapter 11 of the Dayabhaga. But such a notion was held to be erroneous by the Full Bench of the High Court at Calcutta in *Rajkishore Lahoory* v. *Gobind Chunder Lahoory*, I. L. R, 1 C, 27, and see *Sheo Soondary* v. *Pirthee Singh*, L. R, 4 I A, 147 wherein it was decided that by the Hindu law current in Bengal, a brother of the whole blood succeeds in the case of an undivided immoveable estate, in preference to a brother of the half-blood. The *ratio decidendi* is that the doctrine of survivorship has no operation under the Dayabhaga law either as part of the general scheme of inheritance or as an exception to it.

Again the recognized foundation of the right of survivorship is the Smriti of Narada cited in Mit., Ch. II, S. 1, Verse 7. But Jimutavahana notices this Smriti in Ch. XI, S. 1, Verse 48 of

the Dayabhaga, and concludes after a consideration of the ot
Smritis, especially the Smriti of Vrihaspati, that Narada conte
plated the case of wives of an inferior rank who do not possess
status of a Patni or the lawful wife of approved rank. On
construction suggested by him in Verse 54 there is no foundat
in the Smriti law on which the doctrine of survivorship can r
As the Mitakshara, however, differs from the Dayabhaga, the de
sion in the Tipperah case, although it is in perfect accordance w
the Dayabhaga law, has no application in the Mitakshara countr

It is further urged by the learned pleader for responde
that assuming that the Tipperah Hills and estate are governed
the Dayabhaga law, the reason assigned by the Privy Council
their decision suggests that the character of impartible prope
as one capable of sole enjoyment by the incumbent for the t
being is so much in the nature of separate property, that
inconsistent with the theory of co-parcenary of which unit
ownership and unity of possession *quoad* the property in litiga
are essential incidents.

This contention is sound only in the Dayabhaga country,
as explained by this court in *Naraganti Achamma Garu* v. *Venk
chalapati Nayanivaru*, I. L. R, 4 M, 250 at p. 266 the modificat
of co-parcenary which flow from impartibility consists in th
"Where from the nature of the property, possession is left
one co-parcener, the others are not divested of co ownership. T
necessary exclusion from possession imposes on the co-owne
possession two obligations to his co-parceners in virtue of t
co-ownership the obligation to provide them with maintenance
the obligation to preserve the *corpus* of the estate. The righ
possession and maintenance are to this extent distinct and inco
tent that they cannot co-exist and be enjoyed by the same pers
that the one is a right to the immediate perceptions of the fr
of the property, the other a right to an indirect benefit, but
rights have a common origin, unity of ownership. * * * Sepa
possession but not separate ownership, is the characteristic of
perty, which although impartible is *ex hypothesi* joint. Co-ow
ship, which is the cause of survivorship, was held not to exi
the case of the Tipperah Raj. We should have hesitated to exp
an opinion at variance with that ruling if we could find no sup

our views in a ruling which is equally imperative upon us, and m which, in the Tipperah case their Lordships expressed no inten- 1 to dissent. In *Katama Natchiar* v. *The Rajah of Shivaganga*, [. I. A, 593 their Lordships declared that in the absence of of of a special custom of descent, the succession to a Zamindari partible and capable of enjoyment by one member only of the ily at a time, is governed by the general Hindu law prevalent hat part of India with such qualifications only as flow from the artible character of the subject. The impartibility of the sub- does not necessitate the denial of the right of survivorship, and re are not wanting in the admitted rules which govern the yment of such property and the succession to it *indicia* of wnership and consequent survivorship." This case is an hority in this Presidency for the proposition that the very cus- by which co-parcenary property is rendered impartible suggests vivorship, as a neccssary incident of impartibility and that it is correct to say that there is no co-parcenership in regard to h property, the difference being only in the form in which co- cenary exists in respect of partible and impartible property.

In this connection our attention is drawn to the decision of Privy Council in *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*, R, 15 I. A, 51. This case modifies the opinion expressed he last preceding case to this extent and no further, "When estate is governed by the Mitakshara law and it is impartible the usage and custom of family and descends according to the of primogeniture on the male heirs of the original grantee, the te is not inalienable except on proof of special custom." The is therefore an authority for the proposition that inalienability ot one of the modifications which flow necessarily from the artibility of the subject. As regards survivorship as a cause uccession, their lordships expressly save it and say, "By the om or usage, the eldest son succeeds to the whole estate on the th of the father as he would if the estate were held in severalty. difficult to reconcile this mode of succession with the rights of a t family and to hold that there is joint ownership which restraint on alienation. It is not so difficult where the holder he estate has no son and it is necessary to decide who is to eed." Referring to the Sivaganga case, their lordships add e saying in the Sivaganga case that the Zamindari though

impartible was part of the family property must be understood with reference to the question which was then before their lordships." That question was one of succession and not of alienation *inter vivos*.

Another case referred to is what is called the Totapalli case, 13 M. I. A, 333, *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora*. In that case an impartible estate belonging to a joint Hindu family was usurped by one of the members of the family. The Zamindar by the aid of another member of the family ousted him and afterwards entered into an agreement with him to pay the revenue. There was no division in the family. It was argued in that case by appellant's counsel that the estate being impartible must from its very nature be taken to be separate estate and consequently that according to the decision in the Sivaganga case, the succession was determinable by the law which regulates the successsion to a separate estate, whether the family be divided or undivided. With reference to the first contention, their lordships' answer was, "It is clear that the mere impartibility of the estate is *not* sufficient to make the succession follow the course of succession to separate estate. Their lordships apprehend that if they were to hold that it did so, they would affect the titles to many estates held and enjoyed as impartible in different parts of India. Has it then been shewn that, though the family was undivided, the estate was in fact the separate property of the appellant's husband?" After answering the above question in the negative their lordships answerered the second question in these terms.—"In the Sivaganga case, the Zamindari had escheated to Government which was free to deal with it as it chose. By a new Sannad the Government granted it to Gouri Vallabha, conferring a legal title which none could dispute. But what was done in this case?" After referring to the facts of that case their lordships state, "this account shows no legal forfeiture, no fresh grant by any person competent to grant a legal title. It only shows that on a dispute between Mallappa Dhora and his superior, another member of the family came in and, with the strong hand and in concert with the superior, succeeded in ousting Mallappa Dhora and in assuming the position and right of the Zamindar." This case is an authority for the position that forcible dispossession produces no change in the nature and tenure of the impartible property.

Another case is that of *Maharani Hiranath Koer* v. *Baboo Ram Narayan Sing,* 9 B. L. R, 274, at page 324 in which the Tipperah case was dissented from.

Two other cases were also referred to at the hearing,—*Ranganayakamma* v. *Ramaya,* Mayne, 599 and the *Padamathur case,* I. L. R, 1 M, 312. They follow the Sivaganga case.

The latest case is that of *Raja Jogendra Bhupati Harri Chundun Mahapatra* v. *Nityanund Mansingh,* L. R, 17 I A, 128. In that case the contest was as to the right of succession to an impartible Raj and a Zamindari, the rival claimants being the last male holder, Nandikishore's three widows and daughter on the one side and his illegitimate brother on the other. The joint family belonged to the Sudra caste. Their Lordships of the Privy Council held that the illegitimate brother was entitled under the Mitakshara law to succeed by survivorship and observed as follows :—" According to the decision in the Sivaganga case which, as their Lordships understand is not now disputed, the fact of the Raj being impartible does not affect the rule of succession. In considering who is to succeed on the death of the Raja, the rules which govern the succession to a partible estate are to be looked at and therefore the question in this case is, what would be the right of succession, supposing instead of being an impartible estate it were a partible one." After discussing the point and concluding that the right of survivorship existed as between the deceased Zamindar and his illegitimate brother, their Lordships held that the latter was entitled to succeed to the Raj by virtue of survivorship. This case is the latest authority for the position that when the impartible estate belongs to a co-parcenary family, the right of survivorship determines the heir entitled to succeed.

The next question is whether the suit is barred by Ss. 13, 244, and 312 of the Code of Civil Procedure. It is conceded that if the 8th issue is determined against the appellant, this question must likewise be decided against him.

The 8th issue is whether the plaintiff and his predecessor in title were properly represented in Original Suit No. 14 of 1866. The Subordinate Judge states the facts of the case so far as they bear on this question in paragraphs 36 to 57 of his judgment and

comes to the conclusion that the appellant and the Zamindar whom he succeeded were represented for the reasons mentioned in paragraphs 58 to 103. To this finding several objections are taken on behalf of the appellant.

The first objection is that though the appellant and his predecessor in title were made defendants in Original Suit No. 14 of 1866, yet they were then minors and they were not described either as defendants by their mothers and guardians, nor were their mothers, who were also defendants, described as the guardians of their minor sons. It appears from the decree in that suit (Exhibit XXII) that the first eleven defendants consisted of the six widows and the five minor sons of the former Zamindar, Bhuloka Pandia, including the plaintiff and his predecessor in title, the mother's name being entered first as that of a defendant and the minor's name being entered next as that of her minor son. It is not stated in terms that the mother of each minor was appointed or made a party as his guardian *ad litem* but it is clear that, in each case, the mother was her minor's son's natural guardian and that the object in including both as defendants was presumably to make both parties to the suit, the mother as Bhuloka Pandia's widow, and the minor son by his mother and natural guardian. It was Act VIII of 1859 that was in force when the suit was brought and it contained no provisions as to appointment by the court of guardians *ad litem* for minor defendants. According to the then practice of the court, it was sufficient if the mother was made a party as guardian and permitted to act as such on his behalf. It is also in evidence (Exhibits XXIX to XXXII) that the mother of Subhramania Paudia Chokka Talavar, plaintiff's predecessor in title, applied by Exhibit XXXI for a postponement of the sale and preferred an appeal to the High Court from the order of the Civil Judge refusing her application. The conclusion we come to is that in the suit of 1866, as originally framed, appellant and his predecessor's mothers were included to act as their guardians, that the court allowed them to act as such, that one of them endeavoured in execution proceedings to obtain a postponement of the sale and that, though the description is defective, the defect is merely one of form and the minors were in no way prejudiced thereby.

Even assuming that the description is insufficient, we must still hold that the minors were adequately represented and their

interest carefully protected by the Collector of the District, as the agent of the Court of Wards and as their guardian *ad litem* Original Suit No. 14 of 1866 was instituted subsequent to the death of Bhuloka Pandia Chokka Talavar but prior to the recognition of his son, Chokka Talavar, by the Government as his successor and to the assumption of management of the Zamindari by the Court of Wards. After the court entered on the management of the estate, the Civil Judge included the Collector of the District as the 12th defendant and Exhibit XXI shows that he was made a party as the *ex-officio* guardian of the minor *heirs*. It is clear, therefore, that the minors were sufficiently represented by the Collector as their guardian *ad litem* if not also by their mothers previously. But it is urged on behalf of the appellant that the Collector as agent of the Court of Wards was the lawful guardian only of the then recognised Zamindar on whose behalf the Court of Wards held the Zamindari but not of his brothers including the plaintiff and his predecessors in title, the then fifth and ninth defendants. We do not, however, attach weight to this contention as it is open to the judge to appoint any competent person as guardian *ad litem* provided that there is no antagonism between his interest and that of the minors in the subject-matter of the suit. Exhibit F 4 shows that the Collector accepted the appointment and acted as guardian of all the minor sons. Representation by him of all minor sons as their guardian under the order of the court is sufficient, even if it were held that the Collector could only treat under Reg. V of 1804 the particular minor on whose behalf the Court of Wards then managed the Zamindari as their proper Ward.

The 2nd objection is that the mother of the minors allowed the trial to proceed *ex parte* and that summonses were not served upon them. As regards non-service of summonses the allegation was attempted to be supported by oral evidence which the Subordinate Judge has discredited. As to the weight due to the oral evidence on this point, we concur in his opinion. It is true that Exhibit XXI, copy of the judgment in Original Suit No. 14 of 1866, shows that the Collector alone defended the suit, but the circumstances of the case suggest the inference that the minors' mothers left the defence to be conducted by that officer acting under the direction of the Court of Wards as he was more competent than themselves adequately to protect the minors' interests. We may

here observe that the interests of the then *de facto* minor Zamindar who was the ward of the Court of Wards under Reg. V of 1804, were identical with those of his brothers so far as they related to the subject matter of that suit.

The third objection is that the admission by the Collector of the claim was an act not compatible with his position as guardian *ad litem* and prejudicial to the minors. Exhibit XXI proves that the Collector acknowledged the correctness of the plaint in Original Suit No. 14 of 1866 but requested that the debt sued for and other debts might be permitted to be paid rateably from the income of the estate as it was realised. If the claim was true and valid (it will appear later on from this judgment that such was really the case), it is preposterous to say that the guardian should not have acknowledged the claim but put the plaintiff to the proof of it. Such conduct on his part would add to the costs of the suit which would be a needless burden on the estate. We are of opinion that the Collector's action was *bona fide* and abundantly warranted by the actual facts of the case.

It is here argued that of the six instalments for which a decree was asked for in the plaint, only three were overdue at date of suit, that the 4th, 5th, and 6th instalments had not then accrued due, and that the Collector ought to have resisted the claim for a declaratory decree in respect of the last mentioned instalments. It is true that the plaint prayed for an order of the court directing defendants to pay into court the 4th, 5th and 6th instalments as agreed on in the Razinamas on which the suit was based. It is also true that the Civil Court decided that there must be a decree for the then plaintiff for the amount sued for and for an order that the 4th, 5th and 6th instalments be paid as they fell due. Assuming that no such order should have been made the then plaintiff might have obtained separate decrees for those instalments with costs prior to the date of the court sale. The omission, therefore, of the Collector to take the technical objection now argued saved the minor costs of other suits which the creditor was at liberty to institute as each instalment fell due. Considering that he put in the written statement in communication with the Court of Wards and with its sanction, and seeing also that the Collector then asked the Civil Court for indulgence as to payment of the

decree amount from the income of the Zamindari, his action was perfectly *bona fide*. It was not then unusual for the Civil Courts in order to avoid multiplicity of suits (though the practice is now considered loose) to include a direction in the decree passed on instalment bonds to pay future instalments due on those bonds as they fell due.

Another objection taken to the finding on the 8th. issue is that the decree was merely declaratory in so far as it related to the 4th, 5th and 6th instalments and that the decree was nevertheless executed against the minor's estate.

It must be observed, however, that the decree was not declaratory but contained an order for payment as those instalments fell due and in fact the sale now impugned by the appellant took place long after they had become overdue. In our opinion this objection is entitled to no weight.

Another objection is that the Collector ought to have objected to the execution of the decree on the ground mentioned in the last paragraph when he represented the plaintiff's predecessor in title in execution proceedings. In fact the Collector did not then take the objection; but if it had been taken, it must have been disallowed for the simple reason that on its true construction, the decree was not declaratory after the future instalments became due any more than a decree for payment of future maintenance at a fixed rate would be and that in execution courts do not go behind the decree sought to be executed, but take it as they find it unless it is impugned for fraud or want of jurisdiction patent on the face of the record.

It is also an admitted fact that neither the plaintiff's predecessor in title nor any one else on his behalf objected to the execution of the decree at any time before his death and we do not think that the plaintiff is now at liberty to rip open the decree and to undo proceedings held in its execution and completed during his predecessor's lifetime except on the ground of fraud or collusion.

The next objection is that the Collector should have obtained an adjournment of the sale and not allowed the property in dispute to be sold. The Subordinate Judge refers to the several applications made for adjournments of the sale, to the several adjournments

actually granted, to the order of the Civil Judge refusing last application and to the several attempts made to pre the sale and to its being at last found unavoidable as show Collector Mr. Longly's letter. We agree in the opinion that sale was not due to any laches on the Collector's part as guar of the plaintiff's predecessor in title, but to its being found ot wise impracticable to clear off the heavy debt left by Bhu Pandia Chokka Talavar.

The next objection is that there was no attachment pric the sale. This is not well founded in fact and it is inconsis with the appellant's admission in the plaint. There are several exhibits which prove that an attachment preceded the On this point we agree with the Subordinate Judge that objection has no foundation in fact.

Passing on the ninth issue, we observe that there is n particle of evidence in support of the alleged fraud. The lea pleader for the appellant states that he relies on the object taken by him to the decision of the Subordinate Judge on the issue as constituting together a case of fraud. We are of opi that they do not amount to fraud.

The last question which remains to be considered in this ap is that raised by the 10th issue. The plaintiff's case was that decree debt was vicious and immoral and that although it originaly been contracted by his father yet it was not one bin upon him. The contention for the defendants was that the debt incurred for purposes binding on the former Zamindar, Bhu Pandiar's family, and therefore on the plaintiff. The Subordi Judge has stated the evidence on each side and after caref considering it at length has come to the finding that, the debt neither vicious nor immoral as alleged by the appellant, but w debt contracted by a Hindu father for purposes binding on family. In this opinion we entirely concur. The evidence defendants clearly traces the nucleus of the decree debt to d contracted by appellant's father in 1845 and 1849 whilst plaintiff was born only in 1861. Original Suit No. 1 of 1845 brought by an illegitimate son of appellant's grand-father an that suit the grand-father and Bhuloka Pandia, appellant's fat were made parties. The object of that suit was to recover posses

of a pannai land or home farm on the ground that it ha sold to the then plaintiff by appellant's grand-father. Appe father resisted the claim, but the suit ended in a comp: Exhibit V, whereby it was agreed that appellan't grand should pay the then plaintiff Rs. 7000, that the sale in favor latter should be cancelled, and that appellant's father succeed to the pannai land given up by the then plaintiff. Ai compromise appellant's grand-father died and appellant's succeeded to the Zamindari and the pannai land in Nov 1845.

In order to pay the sum of Rs. 7000 due under the Raz to pay peishcush, and the then Zamindar's installation expens palace expenses, appellant's father borrowed Rs. 22,000 fr Vellayan Chetti. That this debt was contracted for the mentioned purposes is, as observed by the Subordinate proved by defendant's witnessess Nos. 1, 3, 4, 7 and 8, by pla witnesses Nos. 4 and 22 and by the compromise V.

Vellayan Chetti instituted Original Suit No. 1 of 1849 a appellant's father and another and the suit terminated al compromise, whereby appellant's father undertook to pay th in certain instalments (Exhibits VI and XVIII).

In order to pay Vellayan Chetti, appellant's father bo from one Venkatachellam Chetti, who subsequently b Original Suit No. 3 of 1854 which suit terminated in a comp which secured the debt on the Zamindari and moveable prop appellant's father. In execution of the decree several Raz were filed, the last of which was for Rs. 36,000. Venkatac assigned his right under the Razinama to Chidambaram the plaintiff in Original Suit No. 14 of 1866 in execution decree in which the court sales now in dispute took place.

Thus the nucleus of the decree debt is traced by a s public documents to the money borrowed from Vellayan prior to Original Suit No. 1 of 1849 of which Rs. 7,000 amount undertaken to be paid to secure to appellant's fat succession to certain pannai land yielding an annual of Rs. 10,000 and Rs. 15,000 were borrowed for paymen peishcush, (2) installation expenses, and (3) palace expenses argued by the appellant's pleader that the Razinama enter

by appellant's father with Venkatachella Chetti does not operate to create a charge but only evidences a money debt. We should be inclined to hold that it did create a charge, for the language of the instrument suggests an intention to secure the debt on specific property. The insertion of general words moveable property in addition to the Zamindari cannot defeat that intention which is the key to the right construction. However, it is not necessary to determine this question for the purposes of the present appeal as we concur in the opinion of the Subordinate Judge that before the property in dispute was sold, it had been attached in execution of the decree. On the other hand the appellant's contention that the decree debt was immoral rests on mere oral evidence. The Subordinate Judge sets out the evidence and considers it not trustworthy and the reasons assigned by him support his conclusion. On reading the evidence we do not see our way to coming to a different finding. Thus on the one side there is unimpeachable documentary evidence whilst on the other side there is only questionable oral evidence in regard to transactions which took place more than 40 years ago, the evidence being produced at a late stage of the final hearing and several of the witnesses being in a position to be influenced by a person in the appellant's position. We have therefore no hesitation in adopting the finding of the Subordinate Judge on the 10th issue. Apart from the weight due to the evidence, there are also several reasons why the appellant should not now be permitted to question the virtue of the debt. (1). It was held by the Privy Council in the case referred to in paragraph 30 and reported in L. R, 15 I. A, p. 51 that a Hindu son has no power unless he has it by special custom to question the alienation of an impartible estate by his father and in the present case there is no proof of such custom. (II). There is also the fact that the debt sued for in Original Suit No. 14 of 1866 had been contracted more than 10 years previous to the birth of the appellant. (III) Again the original debt merged into a decree debt during the life-time of appellant's predecessor in title and in a suit to which both appellant and his predecessor in title were substantially parties and there is no proof of fraud nor any other material fact upon which appellant can repudiate the decree in Original Suit No. 14 of 1866 or the court sales in its execution.

We shall here briefly notice another question which respondents argued at the hearing of this appeal with reference to the

relinquishment in favour of the appellant of any interest which they possessed in the Zamindari. Exhibit C evidences such relinquishment and it is admitted by both the brothers of the full blood, Sendura Pandia Talavar and Chokka Talavar. Also in their evidence as the 3rd witness for the plaintiff and as the court first witness, they acknowledge the appellant's right to the Zamindari. The Subordinate Judge held that on the true construction of the document, their rights of survivorship to the Zamindari were not the interest relinquished but we are unable to support this construction, having regard to the language of paragraph 6 of document C. It is in these terms in further, as we have given up in consideration for this, all our right, interest, and title, &c., in the movable and immovable properties such as the Zamindari &c., capable of improvement by you as far as our share of maintenance is concerned, and as what we have received is sufficient for our share of maintenance suitable to our dignity as per Zamindari custom and our shares, you and we are not undivided, but divided Gnathis (Bandhus) and we shall live in separate families. The words "such as the Zamindari" and "we are divided" disclose an intention to regard the Zamindari as appellant's exclusive property from the date of the document.

The respondent's contention is that appellant's claim as based on Exhibit C would be time-barred and that the relinquishment is not available to appellant as an additional ground in support of his claim. It is argued that though Sendura Pandian, the next junior brother of the appellant and the eldest of the surviving brothers of the whole blood might not be time-barred by reason of his having attained his majority within three years before he executed C, yet the privilege conferred upon minors by S. 7 of the Limitation Act is personal to them and does not extend to their adult transferrees and that the transfer of their right after a period of 12 years from the date on which the sale was conferred and before the expiry of three years a period which is allowed to them as a personal privilege, is not actionable if the transferree had attained his majority more than three years before. In support of this contention reliance is placed on the decisions reported at I. L. R, 9 C, 663, *Rudra Kant Surma Sircar* v. *Nabo Kishore Surma Biswas*, and 15 B. L. R, 357, *Mahomed Arsad Chowdhry* v. *Yakoob Ally*. Those decisions involve, however, the apparent

anomaly that a minor cannot transfer his title to property though at the date of transfer it is a subsisting interest so far as he is concerned. In the view which we take of the question whether a brother of the whole blood is entitled to succeed to an impartible Zamindari in preference to his elder brother of half blood, it is not necessary for us to determine this question for the purposes of this appeal. Thus the appellant's claim is barred first by limitation, and next by Ss. 13, 244, and 312 of the Code of Civil Procedure, and lastly it also fails on the merits.

As this is a case which may be taken to the Privy Council and as the Original Suit was instituted in 1885 and the appeal preferred in 1891, we have deemed it fit to consider at length all the questions argued before us on appeal in order that no occasion may arise for further investigation. The result is that the appeal cannot be supported and must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice *Wilkinson.*

Volkart Brothers ... Plaintiffs in S. C. S. No. 12040 of 1891.*

v.

C. Ruthnavelu Chetti ... Defendant Do.

Volkart Brothers *v.* Ruthnavelu Chetti

Construction of contract—Shipment at monthly intervals.

In a contract for the shipment of goods in 6 lots of 20 cases each at monthly intervals, the phrase 'shipment at monthly intervals' means that there should be an interval of one month more or less between one shipment and another, regard being had to the time which it may be reasonable to allow for finding a steamer available for the required shipment.

Case stated under S. 69 of Act XV of 1882 and S. 617 of Act XIV of 1882 by the Chief Judge of the Court of Small Causes, Madras, in Small Cause Suit No. 12040 of 1891 on his file.

The facts of this case are sufficiently stated in the following order:

Mr. K. Anderson (with *Messrs. Wilson* and *King* for plaintiffs.

Messrs. R. F. Grant and *F. G. R. Branson* for defendant.

Ref. case No. 12 of 1892. 6th February 1894.

This case first came on for hearing on the 21st October, 1
before their Lordships, *Muthusami Aiyar* and *Wilkinson,*
when the court made the following order.

ORDER :—The first question referred for our opinion is w
is the proper construction of the agreement, Exhibit A. By
document the defendant agreed to purchase from the plain
120 cases of condensed milk which were to be shipped in Lon
and delivered in Madras. The part of the agreement as to w
there is a conflict is in these terms, "shipment in six lots of tw
cases each at monthly intervals."

On behalf of the plaintiffs it was contended that the expres
"shipment at monthly intervals" means shipment in consecu
months, or, as the learned Chief Judge puts it, shipment month
month, whereas the defendant contended that the expres
meant that the shipment should be made at intervals of a m
from each other.

It is not suggested on either side that the expression is u
among merchants in any technical sense. Now the term "mont
can only mean once a month or every month and the t
"intervals" the time between two shipments. In the ordi
sense of the words therefore the expression "shipment at mon
intervals" means that there was to be an interval of one m
between each shipment. As the learned Chief Judge obse
the importer wishing to arrange that his supplies should arri
fixed periods would naturally stipulate that the date of ship
from the export country should be certain. He also refe
Exhibit E, the letter written by the plaintiffs' firm on the
August, as showing that the plaintiffs understood that the
"monthly intervals" meant at intervals of a month as near
possible. It is urged by plaintiffs' counsel that it would
unreasonable to hold that the plaintiffs contracted to ship
twenty cases at exact intervals of one month as they would
to wait till a steamer was available or charter a special ste
for the conveyance of the twenty cases. There can be no d
that in determining what is the construction to be put upo
term "shipment at monthly intervals," regard should be ha
the possibility of finding a steamer available for shipment on or a
the monthly interval as well as to the necessity for defen
getting his supplies at regular intervals.

The reasonable construction therefore is that the
ontemplated by the parties to the document was not p
hirty days or one month, but one month more or less,
eing had to the time which it may be reasonable to allo
laintiffs for finding a steamer available for the required sl

This is in accordance with the rule mentioned by *Cres*
n *Wilson* v. *Bevan*, 7 C. B. R, 673, which he stated
vords :—" When the intention of the parties to a contract
iently apparent, effect must be given to it in that sense
ome violence be thereby done to the words. Where the i
s doubtful the safest course is to take the words in their
ense." In applying the rule it must also be observed
ardship to either party is not an element to be considere
t amounts to a degree of inconvenience and absurdity so
o afford judicial proof that such could not be the meanir
arties, *Prebble* v. *Bonghurst*, 1 Swanston, 329.

* * * * *

IN THE HIGH COURT OF JUDICATURE AT MAI

Present :—Mr. Justice Muthusami Aiyar and Mr.
Davies.

Srimat Prativadi Bhayenkaram Annam Govinda Charlu Ayyavarlu Garu ... } Appellant (*Pla*

v.

Sri Rajah Kocherlakota Ramachendra Venkata Krishna Rao Bahadur Garu and others. } Respondents (*ants* Nos. 5, {

Pleader's fee—Declaratory suit—Legal Practitioners Act XVIII of 187
5—Powers of Appellate Court—Civil Procedure Code, S. 565

For the purposes of computing pleader's fees, a declaratory suit f
Rule 35 of the Rules framed under the Legal Practitioner's Act and
Rule 31. In such cases the court ought to fix a reasonable fee having reg
ime occupied in the preparation and hearing of the case and the nature o
ions raised therein. The Lower Court having failed to do so, the H
xercised its discretion and fixed a reasonable fee under the provisions of S.
Civil Procedure Code.

Appeal against the decree of the Subordinate Judge o
n Original Suit No. 2 of 1885 in so far as it directed a
o pay Rs. 656-8-0 for Pleader's fee in the matter of costs
y the 3rd respondent.

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* A. S. No. 111 of 1890. 14th July 189

of this case appear sufficiently from the following

thasaradhi Aiyangar for appellant.

rangachariar for respondent No. 3.

taramiah Chetti for respondent No. 1.

INT :—This was a suit for a declaratory decree under Specific Relief Act of 1877. It was dismissed with ere calculated at Rs. 656-8-0. The plaintiff appeals xation and claims that a reasonable fee under Clause s framed under the Legal Practitioners' Act should wed, the suit being one in which the subject matter id not admit of valuation. The costs as taxed were d under Clause 31 of the Rules alluded to. But clearly not applicable to this case because the charac- t is not one of those mentioned in that clause. The use which is applicable is the one quoted by the ader, namely, Clause 35, and we consider the case falls rms of that rule as being one in which the subject laim did not admit of valuation. A declaratory suit valued by the measure of the consequential relief en no consequential relief is sued for, as in this case g left to determine the value of the action. We are is opinion by a reference to Art. 17 of the second e Court Fees Act which classifies a suit for a declara- ere no consequential relief is prayed with "every re it is not possible to estimate at a money value the in dispute." Holding then that the case falls under Legal Practitioners' Act we are of opinion that the ourt below should have fixed a reasonable fee regard he time occupied in the preparation and the hearing d the nature of the questions raised therein. We t materials on the record before us to do this and S. 565 of the Code of Civil Procedure we do not er to exercise the discretion which should ordinarily rcised by the Lower Court. Considering that the own for hearing on several different dates, that there

was evidence addu
legal points were
fee of Rs. 400 will
ingly decree that a
fee by the Subor
own costs in this

IN THE HIGH

Present :—Si
Mr. Justice Muthu
Champaden Vittil

Kunnummal Pukk
majayan Nambi

Court Fees Act VII
Procedure Code—Court

Property was sold
disallowed, she brough
fee in the court of first
suit having been dismi
the first court. The
upon the amount of th
appellant making defa

Held by the Full
the category in which
court fee, a second app

Held by the Divis
the amount of the dec
amount paid in the fir
late on the view that
sale was valid and tha
view that the suit wa
should not exceed th
Sub-S. 8 of S. 7 of the

Second Appe
North Malabar d
laneous Petition N
District Munsif o

* S. A. No.

Bench in *Balkaran Rai* v. *Gobind Nath Tiw*
in conflict with another decision of the san
mad Sadik v. *Muhammad Jan,* I. L. R, 1
conflict of decisions we refer the matter
question we refer is, whether, when an a
ground that the proper court fee has not l
judge, a second appeal will lie."

V. Ryru Nambiar for C. Sankaran Na

K. P. Sankara Menon for respondent

JUDGMENTS :—*The Chief Justice* an
The question referred to the Full Bench is,
will lie in this case. The property in dis
and 2nd defendants. In August 1886, tl
Kurup, who sold it again to plaintiff in Fe
defendant obtained a money decree agai
defendants in Original Suit No. 26 of 188
ordinate Court of North Malabar and br
more to sale in execution, and the fourth a
chased it at the court sale for Rs. 975.

The plaintiff preferred a claim as prio
disallowed, she brought this suit to esta

aside the second sale. The court fee paid on her plaint was computed on the sale amount, *viz.*, Rs. 975, and the Court of First Instance held that the sale in her favor was only a colorable transaction and dismissed the suit with costs. From this decision, the plaintiff preferred an appeal and paid on the memorandum of appeal, the same court fee as on the plaint. But the District Judge considered that court fee was payable on the amount of the decree in Original Suit No. 26 of 1888, *viz.*, 2,894-8-0 and called on the plaintiff to make good the deficiency, Rs. 193, within fifteen days from the date of his order.

On the plaintiff failing to comply with this order, the appellate court rejected the appeal, and the preliminary objection is taken before us, that the decision of the judge is final under S. 12 of the Court Fees Act and that no second appeal can be entertained.

Our decision must depend on the construction which ought to be put on S. 12 of the Court Fees Act and on the provisions of the Code of Civil Procedure relating to the same matter.

Section 12 of the Court Fees Act enacts that every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal, shall be decided by the court in which such plaint or memorandum of appeal, as the case may be, is filed, and such decision shall be final as between the parties to the suit. If this section stood alone, the order of the judge, that court fee must be paid, not on the sale amount, but on the amount of decree in execution of which the sale took place, would be final and not open to appeal, however erroneous that order might be. But the Court Fees Act came into force on the 1st April 1870, and Act VIII of 1859 was the Code of Civil Procedure then in force. Section 31 of that enactment contemplated the valuation of a suit in two aspects and provided that "if it appears to the court that the claim is improperly valued, or being properly valued, that the plaint is written upon stamped paper of inadequate value, and the plaintiff on being required by the court to correct such improper valuation, or to supply such additional stamp as may be necessary, shall not comply with the requisition, the court shall reject the plaint." Section 36 allowed an appeal from every order rejecting a plaint.

On comparing the Court Fees Act with the Code of Civil Procedure it will be observed that the material words in the one are "valuation for the purpose of determining the amount of court-fee payable on a plaint"—and those in the other, are "if the claim is improperly valued, or being properly valued, the plaint is written upon stamped paper of inadequate value." The former contemplated the actual fee which ought to be paid, and the latter the two factors involved in computing it. Shortly after the Court Fees Act, the question how the two enactments are to be construed together so that effect may be given to the provisions of both which relate to the same matter or are *in pari materia*, came under the consideration of the different High Courts in this country.

The first case in which the question was considered is that reported in I. L. R, 2 B, 145, *Narayan Madhavrao Naik* v. *The Collector of Thana*. The decision therein adopted the principle, that where a later Act is absolutely repugnant in one of its provisions, to a provision in a former Act, the earlier enactment is *pro tanto* repealed and the learned judges who took part in that case came to the conclusion that under S. 12 of the Court Fees Act the decision of the Lower Court on the amount of court fee payable was final, that the category in which a suit is to be placed was as essential an element of valuation as the subsequent arithmetical computation, by which the fee payable was assertained, and that S. 12 of the Court Fees Act virtually repealed S. 36 of the Code of Civil Procedure.

We must observe here that S. 36 of the Civil Procedure Code was not mentioned in the second or third schedule of the Court Fees Act amongst the enactments wholly or partially repealed and this circumstance gave rise to a doubt as to whether S. 12 repealed S. 36, when the question came to be considered by the High Courts at Calcutta and Allahabad.

In determining the amount of court fee, it will be noted that there are two factors to be considered. It is first necessary to decide to which of the several classes of suits recognized by the Court Fees Act, the suit in question belongs and when the fee prescribed for any particular class of suits, is regulated by the value of the subject matter of the suit, the further question to be considered is, what is the valuation for the purpose of determining the

amount of the fee. It was held at Calcutta in the cases reported in 19 W. R, 214, *Gunga Monee Chawdhrain* v. *Gopal Chunder Roy* and 7 B, L. R, 663, *The Collector of Sylhet* v. *Kalihumar Dut* and at Allahabad in the case reported in I. L. R, 1 A, 360 *Chunia* v. *Ramdial,* that when the judge makes a mistake as to the category in which the suit is to be placed, an appeal will lie under S. 36 of Act VIII of 1859; and when the error is in the computation of value, the decision of the judge is final under S 12 of the Court Fees Act.

Then Act X of 1877 was passed in the place of Act VIII of 1859, and with the conflicting decisions of the different High Courts before them, the legislature adopted the principle laid down by the High Courts at Calcutta in 19 W. R, 214 and at Allahabad in I. L. R, 1 A, 360. Section 54, C. P. C., adopted the classification contained in Ss. 31 and 32 of Act VIII of 1859, and referred in clause (*a*) to undervaluation of the relief sought and in clause (*b*) to cases in which the relief is properly valued but the plaint is written upon paper insufficiently stamped. In place of S. 36 of Act VIII of 1859 which permitted an appeal from every order rejecting a plaint, was inserted only the order passed under clause (*b*) among the appealable orders specified in S. 588 in Act X of 1877.

The next case to which we may refer is the leading case in this Presidency, of *Annamalai Chetti* v. *Cloete,* reported in I. L. R 4 M, 204, wherein the learned *Chief Justice* after explaining the course of legislation, held that S. 12 of the Court Fees Act, which makes the decision of a court in which a plaint or memorandum of appeal is filed, final on questions relating to valuation for the purpose of determining the amount of court fee chargeable, does not affect the question as to the class of suits in which a particular suit ought to be placed. It is thus clear that under S. 588 as it originally stood, an appeal was allowed if there is an error as to the category in which the suit ought to be placed.

The two cases which are referred to as being in conflict with the decision in *Annamalai Chetti* v. *Cloete,* are the decision in Second Appeal No. 1001 of 1891 (Madras) and the case reported at I. L. R, 12 A, 154. The last mentioned decision of the Full Bench is in conflict with the Full Bench decision reported in I. L. R, 11 A, 91.

But in none of these cases the course of legislation and the intention of the legislature to be presumed therefrom, appear to us to have been duly considered.

Another question which requires to be noticed is whether the Amendment Act has made any difference. Section 54, as since amended, retains the classification but orders passed under that section are defined among orders which have the force of a decree. There is no trace of an intention to enlarge or contract the right of appeal with reference to such orders. Under S. 540, an appeal will lie from every decree unless when otherwise expressly provided by this Code or by any other law for the time being in force. No appeal was allowed by Act X of 1877 from an order under S. 54, Clause (*a*), and there is no intention to give an appeal in such case. The Code as amended simply restores the law to the footing on which it stood before Act X of 1877 was passed and the course of decisions then passed and approved by the legislature, is that followed in I. L. R, 4 M, 204.

We are, therefore, of opinion that when the decision of the Judge is erroneous as to the category in which the suit ought to be placed, a second appeal will lie and that in other cases, no second appeal will lie.

Shephard, J.,—I adhere to the opinion expressed in *Kanaran v. Komappan*, I. L. R, 14 M, 169, which was founded on the Judgment in I. L. R, 4 M, 204 (wrongly cited in the report). I think that a question as to the category to which a suit or appeal belongs is not a question the decision of which is made final by S. 12 of the Court Fees Act.

[This second appeal coming on for final disposal on the 6th day of February 1894, after the expression of the opinion of the Full Bench, and having stood over for consideration till this day, the court (*Muthusami Aiyar* and *Best J.J.*) delivered the following:—]

JUDGMENT:—This case comes on again for disposal in accordance with the ruling of the Full Bench as to the scope of S. 12 of the Court Fees Act. That ruling is that, when the question raised in second appeal refers to the category in which the suit from which it arises was placed for the purpose of determining the court fee, a second appeal will lie. On the view that the present

suit was a suit for a decree declaring that the private sale to the plaintiff is valid and that the court sale in favor of the 4th and 5th defendants is invalid, it prays for two distinct declarations and the court fee payable thereon is Rs. 10 for each declaration. Viewing it as a suit for setting aside a court sale, its proper position in the category provided by S. 7 of Act VII of 1870 is similar to that of a suit (Clause VIII) to set aside an attachment of land or of an interest in land or revenue. The court fee should, according to that section, be calculated on the amount for which the land or interest was attached unless that amount exceeds the value of the land or interest therein in which case the fee is to be computed as if the suit was for possession of such land or interest. The court fee paid on the plaint and the memorandum of appeal filed in the District Court was computed on the price for which the land was sold and was therefore in accordance with Clause VIII. The present suit was not for setting aside the decision which led to the court sale and moreover, the plaintiff was not a party to it and we think the judge was not entitled to treat the decree as the subject matter of the suit. All that the plaintiff sought was to protect her right to the land and it is immaterial to her whether the decree is otherwise enforced or not.

The court fee paid in the courts below, in our opinion, being sufficient, we set aside the order of the judge and remand the case for disposal on the merits. The costs in this court will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Davies.

Queen Empress.*

v.

Ramaya Nadan, and others.

Queen Empress v. Ramaya Nadan.

Registration Act III of 1877, Ss. 34, 35—Criminal Procedure Code, S. 195—Sub-Registrar—Sanction—Court.

A Sub-Registrar acting under Ss. 34 and 35 of the Indian Registration Act III of 1877 is not a court within the meaning of S. 195 of the Criminal Procedure Code and his sanction is not therefore necessary for a prosecution for false personation or abetment of false personation with reference to a document registered by him under those sections.

*Crl. Rev. Cases . Nos 339 to 341 of 1893. 18th August 1893.

Atchayya v. *Gangayya*, I L. R, 15 M, 138 and *In re Venkatachala*, I L. R, 10 M, 154 distinguished.

Queen Empress v. *Subba* I. L. R, 11 M, 3 and *Queen Empress* v *Sobhanadri*, I. L. R, 12 M, 201 followed.

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code, by the Acting Sessions Judge of Tinnevelly in his letter dated 12th July 1893, No. 281.

The case as stated by the Session Judge is as follows :—

" I have the honour to submit for the orders of the High Court under Ss. 438 and 215 of the Criminal Procedure Code the records in Sessions Cases Nos. 43, 47 and 50 of 1893 with the recommendation that the orders of commitment may be quashed on a point of law.

" *Sessions case No.* 43 *of* 1893 :—The three accused persons in this case are charged with the abetment of the forgery of a certain valuable security under Ss. 465 and 109, Indian Penal Code. The document was produced before the Sub-Registrar of Sattangulam for registration and during the proceedings before the Sub-Registrar the second accused is said to have falsely personated one Isakkipillai, the supposed executant of the document.

"It is clear that the second accused was a party to the proceeding before the Sub-Registrar and that in that proceeding the allegal forged document was produced as evidence. The Sub-Registrar's sanction therefore appears to be necessary under S. 195, Criminal Procedure Code for prosecution for forgery, the Full Bench ruling reported in I. L. R, 15 M, 138, *Atchayyu* v. *Gangayya*, having settled that the term ' court' in S. 195, Criminal Procedure Code has the same meaning as that assigned to it in S. 3 of the Indian Evidence Act and therefore includes a Sub-Registrar acting under S. 35 of Act III of 1877 (the Indian Registration Act). No such sanction has been obtained in the present case.

" The first and third accused in this case are committed for abetment of false personation by the second accused before the Sub-Registrar and I am doubtful whether they should be considered to be parties to the proceeding before the Sub-Registrar. The word ' party' as applied to a proceeding before a Sub-Registrar under S. 35 of Act III of 1877 is nowhere defined. If it is taken to mean persons occupying a position similar to the position of litigants

in a regular suit, then it appears to me that the person in whose favor the registered document is executed must be considered to be one of the parties to the proceeding, even though he may not actually present the document for registration, because the proceeding before the Registering officers held to determine the right of the party in whose favor the document is executed to have it registered. If the word 'party' is used in a wider sense as including all persons taking a part in the proceedings, then identifying witnesses should be included as parties. The first accused in the present case is the person in whose favor the document is executed and the third accused is one of the attesting witnesses to the document.

"*Session Case No.* 47 of 1893 :—In this case the accused has been committed for the forgery of a certain valuable security under Ss. 467 and 109, Indian Penal Code. The document in question was produced as evidence before the Sub-Registrar of Palamcottah, when it was presented for registration, and the accused appears to me to have been a party to the proceeding before the Sub-Registrar in as much as he signed thedocument as an identifying witness of the person who appeared and admitted execution. The Sub-Registrar's sanction for prosecution for forgery appears therefore to be necessary in this case for the same reasons as those urged above with respect to Session Case No. 48 of 1893. No such sanction has been obtained.

"*Session Case No.* 50 *of* 1893: In this case the first accused is charged under Ss. 467 and 114, Indian Penal Code with the forgery of a valuable security and the second accused with making a false statement as to the identity of the executant of the document when it was presented for registration before the Sub-Registrar of Ottapidaran. There is evidence to show that the first accused was present at the registration of the document and that it was he who secured the attendance of the person who personated the alleged executant before the Sub-Registrar and that it was he who caused the document to be presented by such person. The evidence also shows that it was the first accused who benefited by the registration of the document, the document being executed in his name. Under these circumstances it appears to me that he ought to be considered a party to the proceeding before the Sub-Registrar in the sense contemplated in S. 195, Criminal Procedure Code. It

the first accused is held to have been a party to the proceeding before the Sub-Registrar, the sanction of the latter for his prosecution for forgery should have been obtained and this has not been done. The second accused has not been committed for forgery but only for an offence under S. 82 of Act III of 1877 (an offence not triable exclusively by the Court of Sessions). As he has been committed for trial on the same facts as the first accused and would not have been committed to the Sessions Court at all but for the fact that it was convenient that his case should be inquired into at the same time as that against the first accused, it appears to me to be desirable that his commitment should be quashed and that he should be recommitted to Sessions with the first accused after sanction for prosecution of the first accused has been obtained from the Sub-Registar."

The Acting Government Pleader (*S. Subramaniem*) for the Crown.

JUDGMENT:—The case in *Atchayya* v. *Gangayya*, I. L. R, 15 M, 138, referred to by the Judge dealt only with the case of a Registrar acting under Ss. 72 to 75 of the Indian Registration Act. A Sub-Registrar acting under S. 41 of that act has also been held to be a court (*In re Venkatachala*, I. L. R, 10 M, 154) but it has been held in *Queen Empress* v. *Subba*, I. L. R, 11 M, 3 and *Queen Empress* v. *Sobhanadri*, I. L. R, 12 M, 201, that a Sub-Registrar acting under Ss. 34 and 35 of the Indian Registration act is not a court and those decisions have not been overruled.

There is therefore no reason for quashing the commitments.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Sir Rajah Venkata Swetachalapati Ranga Row Bahadur Garu, Rajah of Bobbili... } Appellant (*Plaintiff*).*

v.

Sir Inuganti Bhavayammi Garu, a ward of the Court of Wards represented by their Agent the Collector of Vizagapatam. .. } Respondents (*Deft*).

* A. S. No. 55 of 1893. 6th March 1894.

Estoppel—Representative—Limitation—Act XIV of 1859—Hindu widow—Adverse possession—Extinction of right—Regulation XIII of 1816—Stamp law—Secondary evidence—Insufficiently stamped original

Rajah of Bobbili v. Bhavayammi.

Where a grant of land was made by the appellant's paternal grandfather to the appellant's adoptive maternal grandfather and resumed on the death of the latter on the ground that the grant was a conditional one, and the appellant claimed to recover the land as representative of his maternal grandfather.

Held that the appellant could not be estopped from questioning the subsequent grant made by his paternal grandfather to the defendant, as the doctrine of estoppel cannot apply when the person making a representation is not the one by whose representative as such the claim is made

When a widow is deprived of property inherited from her husband on the ground that her husband's right to it was conditional, the deprivation is adverse both to the widow and to her reversioners under Act XIV of 1859 and if twelve years elapsed after the dispossession before Act IX of 1871 came into force, the right of the reversioners would be extinguished and could not be revived by Act IX of 1871.

Under Regulation XIII of 1816, the stamp required for a document may be ascertained by the court by determining the actual value of the property where, the document itself does not set out the value.

Where the original of a document which is not produced was insufficiently stamped, secondary evidence is not admissible of its contents.

Appeal against the decree of the District Judge of Vizagapatam in Original Suit No. 39 of 1890.

The facts of the case appear sufficient from the following judgment of the High court.

T Rama Row and *V. Bashyam Aiyangar* for appellant.

S. Subramanien for respondents.

JUDGMENT:—Appellant is the Zamindar of Bobbili, and respondent's late husband, Sitaramaswami, was the sister's son of appellant's paternal grandfather. The property in litigation is the proprietory estate called Chilikala Jagannathapuram and it has admittedly been in the possession first of Sitaramaswami and after his death in that of his widow, the respondent, from February 1862. In that year appellant's paternal grandfather transferred the estate for valuable consideration to respondent's husband under the patta VI. Appellant brought the present suit to eject the respondent from that estate and to recover possession of it with mesne profits for three years, 1887 to 1889. Appellant's mother, Challayammi, was the daughter of Gopayammi who was the sister of appellant's paternal grandfather and wife of one Rajagopala Row. The estate in dispute was first granted to Rajagopala Row

in 1848 and on his death in 1856, his widow and the granter applied to the Collector for its being registered in the name of the latter. The Collector accordingly registered the estate in the name of the granter who, after continuing in possession for six years, transferred it for value under the patta VI to Sitaramaswami as stated above. The ground on which the appellant rests his claim is 'that the first grant to his maternal grandfather Rajagopala Row was absolute and unconditional, that it is not true as stated by his paternal grandfather and maternal grandmother in 1856 (Exhibits XVII and XVIII). The grant was subject to the condition that the estate was to revert to the granter in the event of the grantee dying without male issue, and that the allegation made in 1856 was collusive and made in view to defraud the reversioner. He alleged that his maternal grandmother Gopayammi died in March 1872, that his mother died in May 1887, that he was adopted in February 1871, and attained his majority in 1881. It will thus be seen that appellant claims the estate as the daughter's son by adoption to Rajagopala Row, the grantee of 1848. The respondent resisted the claim on the ground that the grant to Rajagopala Row was not absolute but conditional, that the estate reverted to the granter on Rajagopal's death without male issue, that the transfer of 1862 to her husband was valid and that the appallent's claim was barred by limitation. The Judge held that the grant of 1848 was conditional and that although the claim was not barred by limitation, the appellant was estopped from asserting that his paternal grandfather was not competent to transfer the estate under patta VI and that the transfer was valid. The Judge accordingly dismissed the suit with costs. Hence this appeal. We are unable to agree with the Judge that the doctrine of estoppel applies to this case. It cannot apply when the person making the representation and was not the person as whose representative the plaintiff claims the property and in the case before us the appellant claims the estate in the right of his maternal grandfather and not of his paternal grandfather who was the person that declared that he was competent to transfer it under the patta VI. This limitation of the doctrine of estoppel is mentioned not only in the case referred to by the Judge, *Goury Churn Mookerjee* v. *Jogendronath Mookerjee* Sutherland's Weekly Reporter, 289, C. R, but also by the Privy Council in *Syed Nural Hossein* v. *Sheosahai,* L. R, 19 I. A, 221.

As to the question of limitation, the decision must depend on the further question whether the retransfer to the appellant's paternal grandfather was the result of collusion between him and his sister, Gopayammi. Act XIV of 1852 was the law of limitation in force unil April 1873 and if the appellant's right were barred by that enactment, it could not be revived either by Act IX of 1871 or by Act XV of 1877 under which the death of the female on whose death the reversion becomes an estate vested in possession is the date from which time begins to run against the right or the reversioner to me. Assuming that there was no collusion between appellant's paternal grandfather and maternal grandmother and that the re-transfer to the granter was *bona fide,* the resumption by the granter in 1856 would be an act done in enforcement of an adverse title against both the widow and the reversioner and not merely an act done under an alienation by the widow. The suit would then clearly be barred by Act XIV of 1859. It was also so held in the cases reported in *Tarini Charan Gangali* v. *John Watson,* 3 B. L. R, 437 and *Amirtolall Bose* v. *Rajonikan Miter,* L. R. 2 I A. 113.

The real question then for determination is whether the collusion alleged by Gopayammi and appellant's grandfather is proved. The onus of proving the fraud is clearly upon the appellant and we are of opinion that his oral evidence is not reliable. It is true that his first three witnesses depose to a conversation between appellant's grandfather and maternal grandmother in which it was contrived that they should falsely represent to the Collector that the grant of 1848 was conditional. We are unable to attach weight due to their evidence. In the first place they are all ladies in a position of *Gosha,* dependant on the appellant and in receipt of maintenance from him. They say they never mentioned what they then heard to any one before this suit and it is improbable that they should be able to remember, at this distance of time, the particulars to which they depose.

We are further of opinion that the judge is right in refusing to admit in evidence an alleged copy of the grant of 1848, on the ground that the original was not sufficiently stamped under Regulation XIII of 1816 which was in force in 1848. The copy shows that the stamp used was of Rs. 8 value, whilst it ought to have been of Rs. 50 value. The value of the property is not mentioned in the

copy. The judge was, however, in our opinion, justified in ascertaining the value by reference to Exhibits I and II and that the value of the stamp which should have been used must be calculated with reference to that value. We also agree with him that the copy should not be admitted on payment of penalty, for the provision of the Stamp Act regarding payments of penalty (S. 39 of Act I of 1879) prescribed that such payment shall be endorsed on the document and presupposes that the document is forthcoming. It was also held in *Kopasan* v. *Shamu,* I. L. R, 7 M, 440, that in the case of a lost document no penalty can be levied and secondary evidence admitted. As regards the contention that the onus of proving that the grant was conditional rests on the defendant, we are of opinion that the contention can be supported. In the written statement it was denied that any patta in writing was granted in 1848, and that there was any grant in April of that year at all and it was alleged a conditional grant in August 1848. Under these circumstances we think it is incumbent on the plaintiffs to show that there was an unconditional grant in writing, this being part of his case. As was observed in *Poolin Beharee Sein* v. *Messrs. R. Watson, & Co.,* 9 W. R, 190, the averment in the written statement is in the nature of a plea of confession and avoidance so as to shift the burden on to the defendants. Even assuming the onus of proof to have been in the defendant the judges finding that the grant of 1848 was conditionl as supported by several of defendant's documents, XIV, XVI and XVII, the first of which contains an admission by the appellant's mother in 1874, that the original grant was conditional. The appeal therefore fails and we dismiss it with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Parker and Mr. Justice Best.

Qeen Empress.*

v.

Abbi Reddi, and another.

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* Crl. Appeals Nos. 36 and 37 of 1894. 10th July 1894.

Magistrate without territorial jurisdiction committing—Quashing commitment—Criminal Procedure Code, S. 582. Queen Empress v. Abbi Reddi

Where a Magistrate having authority to commit but not having territorial jurisdiction in respect of the offence commits a case to the proper Sessions Court, the commitment cannot be quashed under S. 532, Criminal Procedure Code.

Appeals against the sentence of the Court of Session of the North Arcot Division in Calendar cases Nos. 57 and 58 of 1893.

The facts of the case appear sufficiently from the following judgments:

C. R. Pattabhirama Aiyar, for appellant.

The Public Prosecutor (*E. B. Powell*), in support of the conviction.

JUDGMENTS:—*Mr Justice Parker*:—I do not think we are bound to set aside the conviction and sentence of the Sessions Court merely on the ground that the Committing Magistrate had no territorial jurisdiction over the place in which the offence is alleged to have been committed. The order of commitment was an order under S. 531, Criminal Procedure Code, not liable to be set aside because the proceedings were taken in a wrong place unless the error occasioned a failure of justice. The Magistrate was himself empowered to commit to the Sessions, and did not in so doing usurp an authority to which he was not entitled. I do not think S. 532, Code of criminal Procedure, applies—See *The Queen Empress* v. *James Ingle* I. L. R, 16 B, 200; nor am I of opinion that the institution of proceedings in the wrong sub-division has occasioned a failure of justice. The Sessions Court which tried the case had territorial jurisdiction even though the Committing Magistrate had not. Under S. 537, Code of Criminal Procedure, we should not be justified in reversing the sentence on account of the irregularity previous to the trial.

Nor do I think accused is entitled to a new trial on account of witnesses whose attendance could not be procured. Every effort was made to secure their attendance.

* * * * *

Mr. Justice Best:—Before proceeding to the merits of this appeal a legal objection to the validity of the trial has to be considered.

It is urged on behalf of appellants that the Joint Magistrate by whom the case was referred to the 2nd Class Magistrate for enquiry with a view to the committal of the case for trial by the

Sessions Court was without jurisdiction in the case and that as the objection was taken before the commitment, the commitment ought to have been quashed under S. 532 of the Code of Criminal Procedure.

The section is as follows :—" If any Magistrate or other authority purporting to exercise powers duly conferred, which were *not so* conferred, commits an accused person for trial before a Court of Session or High Court, the court to which the commitment is made may, after perusal of the proceedings, accept the commitment if it considers that the accused has not been injured thereby, *unless, during the inquiry and before the order of commitment, objection was made,* on behalf either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority.

If such court considers that the accused was injured, *or if* such objection was so made, it shall quash the commitment, and direct a fresh inquiry by a competent Magistrate."

The words "purporting to exercise powers duly conferred" at the beginning of this section appear to me to have reference to S. 206 of the Code and signify "power to commit for trial;" and as all Magistrates in this Presidency are empowered to commit to the Court of Session, I am of opinion that this objection must be disallowed. There can be no doubt that the Sessions Court of the North Arcot District is the proper court to which the case should have been committed, and as the commitment, even if irregular, cannot have prejudiced the accused the objections must be further disallowed with reference to the provisions of S. 537 of the Code.

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FULL BENCH.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muthusami Aiyar, Mr. Justice Shephard, Mr. Justice Best, and Mr. Justice Davies.

Vunde Rajaha Raja the Honourable Sir Rajah Velugoti Sri Rajagopalakrishna Yachendrulu Varu Bahadur, K.C.I.E., Punchahazar, Munsubdar, Rajah of Venkatagiri. ... Appellant (*Defendant*).*

v.

Duvvur Narayana Reddi. ... Repondent (*Plaintiff*).

* A. S. No. 108 of 1892. 28th February 1894; 6th March 1894.

Rajah of Venkatagiri. v. Narayana Reddi.

Registration Act III of 1877, S. 49—Unregistered lease for five years—Admissibility of—Action for damages for non-registration.

In an action for damages for non-registration and for cancellation of a lease for five years of certain villages executed in favor of the plaintiff. *Held* by the Full Bench that the lease though unregistered is admissible in evidence to prove the contract.

Appeal against the decree of the District Judge of Nellore in Original Suit No. 30 of 1890.

The facts of the case appear sufficiently from the following order of reference to the Full Bench.

This appeal came on for hearing before their Lordships the *Chief Justice* and *Mr. Justice Davies* on the 25th September 1893 and having stood over for consideration till the 1st December 1893, the court made the following order of reference to the Full Bench

ORDER :—" This was a suit for damages sustained by plaintiff in consequence of the defendant having cancelled a kararnama. The facts of the case are as follow :—The plaintiff put in a darkast in April 1889 offering to take in Izara two villages in defendant's Zamindari for a term of five years from the 1st July 1889 to 30th June 1893 at a yearly rental of Rs. 1,400. This offer was accepted by the Dewan on the 24th October 1889. (Exhibit IV, and see also Exhibit J). On the 30th November 1889 the plaintiff executed and delivered to the defendant's agents the kabuliat (Exhibit VI) and an hypothecation bond for securing the 1st year's rent (Exhibit VII) and was, on the same day, put in possession of the villages. On the 28th April 1890 the plaintiff gave notice to the defendant (Exhibit O) to register the plaintiff's kabuliat (Exhibit VI) and its counterpart the cowle (Exhibit V). This latter document has not been executed by defendant. The defendant took no notice of this request but a few days afterwards cancelled the lease. This cancellation, the District Judge has found, was made without sufficient cause and we agree with him.

"It will be observed that Exhibits IV, V, VI and VII were produced and filed on behalf of the defendant. At the hearing of the appeal the defendant's counsel objected that these documents could not be considered for any purpose by the court as they were unregistered (S. 49 of the Registration Act). No issue was raised on this point in the Lower Court. The point referred to the Full Bench is,—can the Exhibits J, IV, V, VI and VII be considered to ascertain the nature and terms of the contract made between the

plaintiff and defendant for the purpose of assessing the damages caused to the plaintiff by the wrongful act of the defendant or for any other and what purpose?"

H. G. Wedderburn, K. Brown and *P. V. Krishnasami Chetti* for appellant.

C. R. Pattabhirama Aiyar for respondent.

JUDGMENT :—In the course of the argument it was agreed that the only document as to which any question of registration arises is Exhibit VI, the kabuliat signed by the plaintiff and given to the defendant.

The question is whether that document although not registered can be admitted in evidence in support of the plaintiff's claim. If the plaintiff's action was founded on an alleged title in virtue of a lease granted by the defendant and his case were that as lessee he had been unlawfully ejected from the demised land, there can be no doubt that the document (VI) could not be admitted in evidence. The plaintiff would then be seeking to use it as evidence of a transaction affecting immovable property. But it is clear that that is not the case made in the plaint. The plaint sets out the agreement for a lease of the village which was to run from Fasli 1299 and last for five years. It is stated that certain things were done in pursuance of the agreement, among other things, that the plaintiff was put in possession. Then it is charged that the defendant did not register the kabuliat and improperly deprived the plaintiff of possession. The cause of action alleged is the failure on the part of the defendant to act up to the karar (*i.e*, the agreement for a lease), and the improper resumption of the village.

It is clear that the plaintiff does not assert his title under the incomplete lease and that he does complain of the breach of contract on the part of the defendant in refusing to register the kabuliat and give him a cowle and also in disturbing his possession. The act of the defendant in thus disturbing the plaintiff's possession is merely a part of the defendant's conduct which the plaintiff complains of as a breach of the contract made with him. It is not an essential part, for, if the plaintiff had never been in possession, he would have had his right of action.

Having regard to the language of S. 49 of the Registration Act, we think there is no doubt that the kabuliat although not

registered is admissible in evidence to prove the contract. We do not think it is necessary to refer to the cases cited except the case in *Hurjivan Virji* v. *Jamsetji Nowroji*, I. L. R, 9 B, 63, as to which it has to be observed that although the plaint included a prayer for damages, the judgment makes no reference to it. The decision cannot therefore be cited as an authority against the admissibility of a document in this case.

In our opinion the answer to the question referred should be that the document may be admitted to prove the contract and the damages occasioned by the breach of it.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Soodamani Pattar and others... ... Appellants (*Plaintiffs*).*

v.

Somasundara Mudaliar and others ... Respondents (*Defendants*).

Soodamani Pattar v. Somasundara Mudaliar.

Stamp Act S. 26—Indian Contract Act S. 74—Alternative obligation.

Where a lease provided for payment of 847 salagais of paddy worth Rs. 2,400 per annum, *held* with reference to the circumstances of the case, that the obligation was one for payment of paddy and not an alternative obligation to pay Rs. 2,400 or deliver the quantity of paddy specified.

Held further, that Rs. 2,400 could not be regarded as the maximum compensation payable for failure to deliver paddy under S. 74 of the Indian Contract Act, as the amount was fixed not as a measure of liquidated damages but as the average money value of 847 salagais of paddy

Held also, that S. 26 of the General Stamp Act did not apply so as to render the Rs. 2,400 the maximum recoverable under the contract as the value of the subject matter of the instrument being the amount or value of the average annual rent reserved under Cl. 39 of the first schedule of the Act could not be said to be incapable of ascertainment.

Appeals against the decrees of the District Judge of Coimbatore in Original Suits Nos. 9 and 10 of 1892.

The facts of the case appear sufficiently from the following judgment of the High Court

P. R. Sundara Aiyar for appellants.

P. S. Sivaswami Aiyar for respondents.

JUDGMENT:—This appeal arises from a suit brought by plaintiffs to recover possession of certain land with arrears of rent

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* A. S. Nos. 95 & 96 of 1893. 30th April 1894.

due thereon from 1888 to 1890 and interest at 12 per annum on those arrears and with mesne profits from date of the plaint. The and in question belongs to defendants. On the 27th July 1887, they mortgaged it to plaintiff's family with possession for a period of 12 years for Rs. 14,000. On the 29th idem defendants took it back under a lease of which Exhibit A is the counterpart, the contest in the suit related to three matters, *viz.*, (1) to plaintiff's right to cancel the lease and to claim possession, (2) to defendants' right to pay rent in cash at the rate mentioned therein and (3) to three items in the account claimed by plaintiffs from defendants on the footing of the mortgage and the lease.

As to the first, the District Judge of Coimbatore recognized plaintiffs' right to resume possession; as for the second he held that defendants were entitled to pay rent in money at the rate mentioned in document A, and as regards the third he was of opinion that from the money rent for three years, *viz* Rs. 7,200, the three amounts mentioned in the original decree ought to be deducted.

It is contended on behalf of appellants that the decision of the judge is wrong as to the 2nd and 3rd points in contest whilst under S. 561 respondents object to it so far as it upholds plaintiffs' claim to resume possession.

The 1st question which we have to determine in this appeal is as to plaintiffs' right to insist on payment of rent in paddy or its marked value at the rate of Rs. 5 per salagai of paddy, we are of opinion that defendants are bound, both by the terms of the mortgage and of the lease, to deliver the stipulated quantity of paddy as rent every year. In the instrument of mortgage B, the material words are "you are to take the profits of the land in lieu of interest and Sircar azan and Local Fund cesses payable every year," and they disclose an intention to assign the usufruct in consideration to plaintiffs' right to interest on the mortgage debt and of the other charges which they undertook to pay. This is also the intention which the nature of the transaction as an usufructuary mortgage implies. Moreover, Exhibit B, reserves a right to defendants to make payments on account of the principal before the expiration of 12 years, the period fixed for the redemption of the mortgage. In anticipation of payments in the exercise of such right, the instrument provides as follows with reference to the counter interest

due thereon: "we shall take from you at the end of every year paddy at the rate of three salagais per 100 per annum." This provision for payment of paddy for counter-interest shows that it was the intention that neither party should have an advantage over the other and that both alike should give and take paddy in lieu of interest and counter interest.

Turning to the counter-part of the lease, Exhibit A, the construction which Exhibit B suggests receives an accession of strength the operative words in it are, "We agree to pay you 847 salagais of paddy worth Rs. 2,400 per annum" appear to us to denote the average value of paddy per annum or its equivalent in money, but not to create an alternative right to payment in money at that rate every year, how muchsoever it may differ from the market rate on the day when the paddy becomes due. If it had been intended to create such right the word "or" or other apt words would have been used. The document proceeds to contemplate the contingency of defendants raising a second crop and provides for it in these terms, "We shall pay you in cash every year only Rs. 50 for the kandayam" It is thus clear that the parties knew well how to express their intention aptly when they desired to create an obligation to make a money payment only.

We are unable to agree with the Judge that Rs. 2,400 is all that defendants are bound to pay as rent under document A either under Sections 73 and 74 of the Indian Contract Act or under Section 26 of the General Stamp Act I of 1879.

It is provided by Section 73 that when a contract is broken, the breach entails on the party breaking it an obligation to pay compensation for such loss as naturally arises in the usual course of things or as is comtemplated by the parties to the contract to be likely to arise from that breach. Section 74 premises a contract which names a specific sum as the amount to be paid in case of breach and provides that the compensation to be awarded to the party aggrieved by the breach shall not exceed that amount. In the case before us, the compensation due under Section 73 is the market value of paddy to be delivered on the day on which it should have been delivered whilst section 74 is not applicable because the contract names Rs. 2,400 per annum not as a measure of liquidated damages but as the average annual money value of 847 salagais of paddy which the contract reserves as annual rent for a period

due thereon: "we shall take from you at the end of every year paddy at the rate of three salagais per 100 per annum." This provision for payment of paddy for counter-interest shows that it was the intention that neither party should have an advantage over the other and that both alike should give and take paddy in lieu of interest and counter interest.

Turning to the counter-part of the lease, Exhibit A, the construction which Exhibit B suggests receives an accession of strength the operative words in it are, "We agree to pay you 847 salagais of paddy worth Rs. 2,400 per annum" appear to us to denote the average value of paddy per annum or its equivalent in money, but not to create an alternative right to payment in money at that rate every year, how muchsoever it may differ from the market rate on the day when the paddy becomes due. If it had been intended to create such right the word "or" or other apt words would have been used. The document proceeds to contemplate the contingency of defendants raising a second crop and provides for it in these terms, "We shall pay you in cash every year only Rs. 50 for the kandayam" It is thus clear that the parties knew well how to express their intention aptly when they desired to create an obligation to make a money payment only.

We are unable to agree with the Judge that Rs. 2,400 is all that defendants are bound to pay as rent under document A either under Sections 73 and 74 of the Indian Contract Act or under Section 26 of the General Stamp Act I of 1879.

It is provided by Section 73 that when a contract is broken, the breach entails on the party breaking it an obligation to pay compensation for such loss as naturally arises in the usual course of things or as is comtemplated by the parties to the contract to be likely to arise from that breach. Section 74 premises a contract which names a specific sum as the amount to be paid in case of breach and provides that the compensation to be awarded to the party aggrieved by the breach shall not exceed that amount. In the case before us, the compensation due under Section 73 is the market value of paddy to be delivered on the day on which it should have been delivered whilst section 74 is not applicable because the contract names Rs. 2,400 per annum not as a measure of liquidated damages but as the average annual money value of 847 salagais of paddy which the contract reserves as annual rent for a period

of 12 years. Nor do we think that Section 26 of the General Stamp Act has any application to document A. That section enacts that when the value of the subject matter of any instrument chargeable with advalorem stamp duty cannot be ascertained at the date of its execution, nothing shall be claimable under such instrument more than the highest amount or the value for which, if stated in an instrument of the same description, the stamp actually used would have been sufficient. It must be noted here that the case premised by the section is one in which the value of the subject-matter of the instrument is not capable of being ascertained. But the subject-matter of document A, is under clause 39 of the first schedule of the Act, the "amount or value of the average annual rent reserved."

The rent reserved by A, is 847 salagais of paddy and its average annual value was estimated at Rs. 2,400 per annum. That it was the average annual money value is clear from the language of the instrument and there is nothing on the record to show that the estimated average was insufficient. On comparing Section 26 and Article 39 of the present Act with Section 11 and Article 196 of Act XVIII of 1869 we observe that the subject-matter of a lease exceeding 3 years was described in the last mentioned enactment as the total amount of rent payable under such lease during the first year of the term; which as pointed out by a divisional bench of this Court in *the Collector of Tanjore* v. *Ramasami Aiyar* I. L. R, 3 M, 342, was an uncertain quantity incapable of being ascertained beforehand when the rent is payable in paddy and its money value is the market value when the first year's rent accrues due. In the present Act however, the value of the subject matter is that of the average rent reserved, which may be estimated beforehand without much difficulty. It is not unreasonable to presume from the alteration in the description of the subject-matter of a lease that the probable intention was to designate as the subject matter the average value of the rent during the period of the lease instead of the value of the rent in any particular year and thereby to enable parties to such lease to secure its exemption from the operation of Section 26 by sufficiently estimating the average value before hand. As regards the deductions from the rent, allowed by the Judge, we see no reason to doubt the correctness of his conclusions.

The rate at which the paddy is to be commuted into money is Rs. 5 according to the plaint whilst the rate at which it should be converted into money is the market value of the paddy when it became due for each of the three years mentioned in the plaint. As there is no finding as to the market value we direct the District Judge to ascertain it in execution of the decree.

As regards the claim to interest on arrears of rent there is no provision for it in document A. Having regard to the fact that the market rate was high during the three years in question, we do not think it equitable to award interest on the arrears of paddy.

The decree of the Judge must therefore be modified by directing that defendants deliver to plaintiffs the paddy sued for or pay its value at the market rates which prevailed on the 30th of Panguni of each year less the three amounts which have been deducted by the Judge. Respondents will pay appellants' costs in this Court.

In other respects the decree is confirmed.

As regards respondents' memorandum of objections to the decree so far as it awards possession of the land to appellants the decision of the Judge is correct. Apart from the condition in Exhibit A which reserves a right to plaintiffs to resume possession in case of default in paying rent, the transaction on which the lease is engrafted is a mortgage with possession. The condition is therefore open to the construction that either rent &c., should be paid regularly, or the mortgagee should be permitted to fall back on his right under the usufructuary mortgage. Moreover there was neither payment nor tender of the arrears at the hearing of the suit as contemplated by Section 114 of Act IV of 1882.

We dismiss the objections.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

C Damodara Mudaliar and another ... Appellants (*Defendants*).*

v.

The Secretary of State for India in Council through the Collector of Chingleput. ... .. } Respondent (*Plaintiff.*).

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* A. S. No. 38 of 1893. 21st March 1894.

Damodara Mudaliar v. The Secretary of State for India.

Suit for contribution for repair by one co-owner against another—Indian Contract Act, Ss. 69 and 70.

Where the Government and a Zemindar are co-owners of a tank the water of which irrigates ryotwary villages of Government and the villages of the Zemindary, and necessary repairs are done to the tank by Government without the request of the Zemindar, *Held* that as the repair was lawful and done for the benefit of the Zemindar also, the Government not intending to do so gratuitously and as the Zemindar had benefited by the repair, the Government was entitled to claim contribution for the expenses incurred for the repair with reference to the relative irrigated areas of the Government and Zemindary villages under S. 70 of the Contract Act.

Appeal against the decree of the District Judge of Chingleput in Original Suit No. 10 of 1892.

The suit was instituted by the Secretary of State for India against certain Zemindars for contribution for the expenses of repair of a tank belonging to the plaintiff and the defendants which irrigated ryotwary villages of the Government and some Zemindary villages. The tank having been breached in consequence of floods, repairs became necessary which the Government executed without any request from the defendants. The defendants pleaded non-liability on the ground that they never requested the Government to make the repairs or acquiesced in them. The District Judge gave the plaintiff a decree as prayed for on the authority of the following cases :—*Seshagiri* v. *Pichu*, I. L. R, 11M, 452, *Syed Mahomed Khan* v. *Nawab Shaista Khan*, 2 N. W P, H. C. R, 248, *Shaikh Buzlool Hossein* v. *Gunput Chowdhry*, 25 W. R, 170. The defendants appealed to the High Court.

K. P. Sankara Menon for *C. Sankara Nair* and *V. Masilamani Pillai* for appellants.

K. Brown for the Government Pleader for the respondent.

The court passed the following order.

ORDER :—The question raised by this appeal is whether the defendants being the proprietors of certain villages irrigated by the *Parayankolathur* tank can be made liable for the costs of repairs of that tank incurred by the Government. In as much as other villages held under Government are irrigated by the same tank, the Government were under an obligation to make the repairs and it is found as a fact and not disputed that the repairs were necessary for the preservation of the tank. There are no definite finding

by the District Judge and the evidence is not clear as to the circumstances under which the repairs were undertaken by Government. But it seems clear from the defendants' own statement that they were aware that the repairs were being executed (See BB 1). The averment to that effect made in the plaint is not denied in the written statement and it is not the defendants' case that they were themselves anxious to execute the repairs except in the capacity of contractors or that the act of the Government in undertaking the work was in any way wrongful or improper. The contention on the defendants' part is that the Government were bound to do the repairs at their own expense and not entitled to charge the Zemindars. A further point of minor importance is also taken, *viz.*, that the District Judge has not made a fair apportionment of the cost of the work, having regard to the interests of the Government villages and the Zemindars' villages in the irrigation secured by the tank. On the part of the defendants, it was argued that as there was no contract between them and the Government and no joint liability such as could give rise to an action for contribution, the present action could not be maintained and the case of *Leigh* v. *Dickeson* (XII Q. B. D, 194) was relied on. In that case the parties were tenants-in-common of a house and the claim made was in respect of money expended on substantial and proper repairs. In this view of the facts the present case may be distinguished and another ground of distinction is that in the present case the remedy of partition is not available. In his judgment, *Pollock, B*, expressly distinguished the case from those in which "it has been held that, where an outlay is in the nature of salvage, all interested in the thing saved are bound to contribute"—XII Q. B. D, p. 196. But in the court of appeal where the judgment of *Pollock, B.*, adverse to the claim was affirmed, the decision was put upon grounds which cover cases in which an outlay necessary for the preservation of the thing in which the parties are interested has been made. Indeed *Cotton, L.J.*, starts by assuming "that the house was in a bad state of repair and that the repairs executed by the defendant were necessary."—*Leigh* v. *Dickeson*, XV Q. B. D, p. 66. His decision amounts to this, that in the absence of a request and in the absence of a common obligation to repair, no action for contribution will lie at the suit of one tenant-in-common against another, and that was the judgment of the court of appeal. No reference is made by any of the Lords—

Justices to the doctrine of Salvage. In a later case where the question related to a policy of life insurance and the claim was made in respect of a premium paid by the mortgagor, the court of appeal distinctly held that the doctrine of salvage as understood with reference to maritime cases had no application, and *Bowen, L.J*, states as the general principle that work and labour done or money expended by one man to preserve the property of another do not according to English Law create any obligation to repay the expenditure. In the course of the argument (p. 239) he observes that the law is laid down too widely in the notes to *Lampleigh* v. *Brathwait*, I. Sm. L. C., 151. It follows also from these decisions which after all only re-affirm what has been said in earlier cases that the statement of law made by Chancellor Kent and cited in *Leigh* v. *Dickeson*, XII Q. B. D, p. 199, cannot be accepted as correct according to English authorities (See Kent's commentaries Vol. III, S. 370). As a general rule, a man cannot be made liable for services rendered under circumstances giving him no option of declining or accepting. In the present case it is clear that the facts do not bring it within either of the two exceptions above mentioned. There was no common obligation to repair the tank, the Zemindar and the Government are liable to their tenants respectively, and the tenants of the one could not, it is conceived, make the other responsible for mere neglect to maintain the tank. The exception which covers the case of joint-debtors, one of whom pays the whole debt cannot apply, and it is at least doubtful whether on any principle of contribution or indemnity the plaintiff could recover (See *Leigh* v. *Dickeson*, XV Q. B. D, p. 68, *Dering* v. *Winchelsea*, 2 B, & P. 270, *Moule* v. *Garrett*, L. R, 7 Exch., 104.) Again there was no request on the part of the Zemindars, and though it is possible that if the facts were properly ascertained, a request might have been implied, the District Judge has not found that such implication ought to be made. According to the English authorities it would seem therefore that the action must fail. But the plaintiff's counsel relies on S. 70 of the Contract Act and invites us to hold that a rule of law, differing from that found in the English Cases has been there laid down. By that section three conditions are required to establish a right of action at the suit of a person who does anything for another. The thing must be done lawfully; it must be done by a person not intending to act gratuitously and the person for whom the act is done must enjoy the

benefit of it. There can be little doubt that the statement of the law is derived from the notes to *Lampleigh* v. *Brathwait* and perhaps indirectly from the Roman Law (See Stokes' introduction to the Contract Act). The learned author of Smiths' Leading cases when enumerating the instances in which the request necessary to constitute a cause of action in the case of an executed consideration may be implied gives as the second instance "where the defendant has adopted and enjoyed the benefit of the consideration—(I Sm. L. C. 9 Ed., p. 160). That is the very statement of law which according to Bowen, L. J., is too wide. Nevertheless it is the law we have to apply and we ought not to be deterred from doing so, because the rule is not in harmony with English decisions (See Lord Herschell's observation [(1891) Ap. Ca. 130], or because the application of it may be difficult. Certainly there may be difficulties in applying a rule stated in such wide terms as is that expressed in S. 70. According to the section it is not essential that the act shall have been necessary in the sense that it has been done under circumstances of pressing emergency, or even that it shall have been an act necessary to be done at some time for the preservation of property. It may therefore be extended to cases into which no question of salvage enters. It is not limited to persons standing in particular relations to one another and except in the requirement that the Act shall be lawful, no condition is prescribed as to the circumstances under which it shall be done.

In the present instance the relations of the parties are peculiar. Formerly, as it appears, all the eleven villages irrigated by the tank were Zemindary, seven of them have been severed from the Zemindary and became ordinary ryotwary villages. As a consequence of the severance the duty to maintain the tank has, so far as concerns these latter villages, devolved on Government. As has already been observed, the remedy which is open to tenants-in-common who cannot agree about the enjoyment of property is not available to persons situated as are the parties in the present case. In their relation to the tank their position may be compared to that of the owners of two houses supported by a party wall in respect of which if partition is legally possible, it is at any rate in fact impracticable, See *Watson* v. *Gray*, XIV Ch., D, 192—Bell's commentaries S. 1085.

Now taking the terms of S. 70, we have to see first whether an act was done by the plaintiff for the defendants not intending to do so gratuitously. Here are two questions of fact involved. First, were the repairs executed for the defendants? In a case where the plaintiff has himself no interest in the matter, as in the case put in the illustration of A saving B's property from fire, there can hardly be any doubt as to the answer to be given to the question. The case is that to which in the first instance the rule of Roman law giving a right of action to the *Negotiorum Gestor* was applicable.

The fact that the plaintiff had an interest in the matter may show that he was acting on his own account only. *England* v. *Marsden,* I C. P., 529, affords an illustration. But it is obvious that a person doing an act in which he is himself interested may at the same time intend to act for another. Section 69 and the cases on which it is founded (See *Moule* v. *Garrett,* L. R, 5 Exch., 132, 7 Exch., 104) makes it clear that a payment made by a party interested may be recovered and it would be inconsistent to hold that services done would not equally give a right of action. Having mentioned S. 69, we ought to add that the plaintiff cannot rely directly upon it, because the interest of the plaintiff and the duty of the defendants related to the doing of work and not to the payment of money.

The question whether the act was done for the defendants is one which must be determined according to the circumstances of the case, for one of two persons having a common interest in property may or may not intend to act for the other in the execution of work upon the property. The fact that the latter was benefited by the work does not necessarily show that it was done for him. We think there must be a finding upon the question. There must also be a finding on the question of intention whether or not the intention of Government was to do the repairs at their own cost without making any charge on the Zemindar.

Then comes the question whether in executing the repairs the Government acted lawfully. It is clear that actual consent or request on the part of the defendants need not be proved. It is because the party interested is absent and had given no mandate that the right of action on the part of the *Negotiorum Gestor* accrues

Justinian's Institutes Lib. III, TT., p. 380. On the other hand if the Roman law is to be followed, it must be shown that the act done is one to which the party to be charged would have assented, had he been consulted and the doing of which he had not forbidden. (See Colquham Roman civil law, S. 1766, &c.). It is plain that the section ought not to be so read as to justify the officious interference of one man with the affairs or property of another or to impose obligation in respect of services which the person sought to be charged did not wish to have rendered.

In the present case there can be no doubt that the Government acted lawfully in repairing the tank. The act was lawful whether done with a view of benefiting all the villages under the tank or the Government villages only, and whether or not done with the intention of charging the Zemindars. Having regard to the fact that the Zemindars knew of the intention to execute the repairs and did not disapprove, we think that if the repairs were done for the Zemindars they were done lawfully for them.

The final condition required by the section is that the person charged should have enjoyed the benefit of the act done. On this question an issue was raised but the finding on it is not satisfactory. Indeed the District Judge does not propose to deal with it exactly. Seeing that the greater number of the villages irrigated by the tank are ryotwary villages, *prima facie* we should suppose that the benefit derived by the Zemindar from the repairs was less than that derived by Government. Regard must be had to the irrigable area of the villages owned by Government and the Zemindars respectively. The fact that kist is paid by the Zemindars has nothing to do with the matter. If the cultivated area belonging to the Government villages and watered by the tank is larger than that of the Zemindar's villages, the Government has in the same proportion been the greater gainer by the preservation of the tank. There must be a distinct finding on the 5th issue.

[The District Judge found that the Goveernment had not intended to do the repairs gratuitously, that the defendants had benefited by the repairs and that they were therefore liable in the porportion of the irrigated area of their villages to the irrigated area of the Government villages. The High Court accepted the findings and dismissed the appeal with costs.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Muthusamy Aiyar and Mr. Justice Best.

Krishnaswamy Aiyangar . Applt. in No. 7 (5th *Deft*).*

v.

Rajagopala Aiyangar and others ... Respts (*Plffs.* and *Defts.* 1 to 4 & 6 to 9).

Rangasami Aiyangar and others .. Applts. in No. 50 (2nd, 3rd* and 4th *Defts.*)

v.

Rajagopala Aiyangar and others... Respts. (*Plff.* and 1st *Deft.* and *Defts.* 5 to 9.

Krishnaswami Aiyangar ... ...Applt in No. 51 (1st *Deft.*)*

v.

Rajagopala Aiyangar and others.. Respts. (*Plff.* and *Defts.* 2 to 6).

Krishna Swamy Aiyangar *v.* Rajagopala Aiyangar.

Admissibility of judgments and decrees not *inter partes*—Evidence Act I of 1872, S. 35—Hindu law—Sale by a coparcener of undivided share—Opinion of pleader in argument—Estoppel--Pleader and client—Surplus of sale proceeds of undivided share, joint—Joint property—Remuneration to managing coparcener—Appeal—Provisional decree—Contents of provisional decrees in partition suits—Practice.

Former judgments and decrees not *inter partes* are relevant under S. 35 of the Evidence Act for the purpose of proving a statement made by a predecessor in title of the party against whom they are sought to be used.

Subramanyan v. *Paramaswaran*, I. L. R, 11 M, 116 and *Gujju Lall* v. *Fatteh Lall*, I L. R, 6 C, 171, distinguished.

According to the Mitakshara Law administered in the Madras Presidency, a sale by a Hindu coparcener of his undivided interest in the family property is clearly valid and gives the vendee a right to claim the share of his vendor though not any specific property.

The opinion expressed by a pleader in the course of argument adversely to a claim which he undertook to advocate is not binding on his client when it is not in accordance with the law applicable to the case.

Where a Hindu coparcener under the Mitakshara Law sells his undivided interest in joint family property and a surplus is left after payment of his debts from the sale proceeds and the same is retained by him, or by some one else in trust for him, or laid out in the acquisition of other property, the character of coparcenary property and the incident of survivorship attach to the surplus so retained, or to the property into which it has been converted.

In the absence of a valid special agreement, the managing coparcener of a joint Hindu family is not entitled to any special remuneration for management.

An appeal will lie against a provisional decree in a partition suit. Such a decree ought to declare the several rights and liabilities which have been adjudicated upon and embody an order similar to the one contemplated by Ss. 215 and 215-A of the Civil Procedure Code.

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* A. S. Nos. 7, 50 and 51 of 1892. 30th April 1894.

Appeals against the decree of the Subordinate Judge of Tanjore in Original Suit No. 27 of 1890.

The facts of the case appear sufficiently from the following judgment.

Appeal No. 7 of 1892.

The *Advocate-General* .. } for appellants.
The *Hon. C. Sankara Nair.* }

S. Subramaniem .. } for 1st respondent.
R. Sadagopa Chariar. }

The *Hon. V. Bashyam Aiyangar* for 8th respondent.

C. R. Pattabirama Aiyar for 2nd to 5th respondents.

C. R. Tiruvenkata Chariar for 7th and 9th respondents.

V. Krishnaswamy Aiyangar for 6th respondent.

Appeal No. 50 of 1892.

C. R. Pattabirama Aiyar for appellants.

The *Hon. V. Bashyam Aiyangar* for 6th respondent.

R. Sadagopa Chariar for 1st respondent.

The *Hon. C. Sankara Nair* for 3rd respondent.

C. R. Tiruvenkata Chariar for 5th and 7th respondents.

V. Krishnaswamy Aiyangar for 4 responnent.

Appeal No. 51 of 1892.

C. Mahadeva Aiyar for appellant.

C. R. Pattabirama Aiyar for 3rd and 4th respondents.

S. Subramania Aiyar for *R. Sadagopa Chariar* for 1st respt.

K. P. Govinda Menon for the *Hon. C. Sankara Nair* for 2nd respondent.

V. Krishnaswamy Aiyangar for the 6th respondent.

JUDGMENT:—These three appeals are all from the same decree (No. 7 being by the 5th Defendant, No. 50 by Defendants 2 to 4 and No. 51 by 1st Defendant) in a suit brought by plaintiff for partition of family property, and recovery of a moiety as the share to which he is entitled.

The relationship of the parties will be seen from the following genealogical table.

Kuppanayyangar.

Ammalayyangar (died 1883.) — Kristnayyangar (died 1858.)

Sons of Kristnayyangar: Doraisami (died 1856-7); Varadiayyangar; Rangasami (died 1880-1); Periasami; Chinnasami

Varadiayyangar — Sreenivasa Iyengar (died 1888 — Plaintiff

Rangasami — 1st Deft. (— Defts. 2 & 3 and 4.); Sindu alias Srinivasan died.

Periasami — Kristnasami deceased husband of 7th Deft.

Chinnasami — 5th Deft.

Plaintiff's case is that his grand-father Varadayyangar, the second son of Kristniengar, was adopted by the latter's brother Ammal Iyengar, and that plaintiff is consequently entitled to a moiety of the property as representative of Ammal Iyengar, the other moiety going to defendants 1 to 5 representing Kristnayyangar's branch to which also belonged the late husband of 7th Defendant.

The adoption of plaintiff's grand-father by Ammal Iyengar was denied by all the present appellants as Defendants in the Lower Court and the denial is persisted in by them all as appellants in this Court.

The first question for determination now is therefore, whether or not Varadayyangar was adopted by his uncle Ammal Iyengar.

This was the first issue recorded in the Court below; and the finding of the sub-judge is in the affirmative—see paragraph 32 of his judgment in which he expresses his finding to the above effect after discussing the evidence at length in paragraphs 14 to 31. We do not think it necessary to do more than notice the documents which afford unambiguous evidence of the adoption. These are Exhibits L. Series, O. Series, A and 14, C and E.

From exhibits L, L_1, L_2, L_3, and L_5, it is seen that the adoption of Varadayyangar by Ammalayyangar was stated by the latter's brother, Kristnayyangar, in suits brought by him in 1838, 1841 and 1843 to recover moneys due to Ammalayyangar (then deceased). He explained that the suits were brought by him as Varadayyangar, the adopted son of Ammalayyangar, was under his protection. It has been objected on behalf of appellants that these copies

of judgments are inadmissible as evidence and in support of this objection we were referred to I. L. R., 11 M, 116. Copies of judgments and decrees were there held to be inadmissible with reference to the decision of the majority of Judges of the Calcutta High Court in *Gujju Lall* v. *Fatteh Lall,* I. L. R, 6 C, 171. As pointed out by the court in *Byathamma* v. *Avulla,* I. L. R, 15 M, 19 at page 23, the sole object for which it was sought to use the former judgment in *Gujju Lall* v. *Fatteh Lall,* was to show that in another suit against another defendant the plaintiff had obtained an adjudication in his favour on the same right; and it was held that the opinion expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act. The case is clearly different where the previous judgment is produced not in order to prove an adjudication between third parties, but in order to prove a statement made by a predecessor in title of the party against whom the document is sought to be used; cf. *Parbutty Dassi* v. *Purna Chunder Singh,* I. L. R, 9 C, 586 and *Thama* v. *Kondan,* I. L. R, 15 M, 378. Such is the case here and we have no doubt that the judgments in question are relevant under Section 35 of the Evidence Act. But even were it otherwise, a copy of the plaint in the suit of which L_3 is the judgment is filed as 5th defendant's Exhibit LXVIII and affords the same evidence as Exhibits L. Series. See also 5th Defendent's Exhibit LXVIII *a*; also the N. Series of Exhibits.

[Their Lordships then discussed the evidence and continued as follows]

We see no reason, therefore, to doubt the correctness of the Lower Courts finding either as to the factum or validity of the adoption of Varadayyangar by Ammal Iyenger and the adoption being found to be a fact and valid, plaintiff is clearly entitled to a moiety of the property as representative of Ammalayangar's branch.

The next point for consideration merely affects the shares to which defendants 1 to 5 are entitled *inter se* out of the moiety belonging to their branch as representatives of Kristna Iyengar. On reference to the genealogical table given at the beginning of this judgment, it is seen that Kistnayyangar had five sons, the second of whom Varadyyangar (the grand-father of the plaintiff) was as found above, adopted by Ammalayyangar, the 4th son Periasami had a son Kistnasami who died in 1889, leaving a widow (7th Defen-

dant) and no male issue (his father predeceased him), 5th Defendant is the son of Kristnayyangar's youngest son Chinnasami, Rangasami the 3rd son of Kristnayyangar (died in 1880-1) had two sons, 1st defendant and one Sindu alias Srinivasan and Defendants 2-3 and 4 are the sons of 1st Defendant.

The eldest son Dorasami had no issue. The case of Defendants 1 to 4 is that Dorasami adopted 1st Defendant's younger brother Sindu, and that this latter adopted 3rd Defendant. If such be the fact, Kistna Iyengar's moiety of the property is divisible into three shares, one of which belongs to 3rd Defendant, another to Defendants 1, 2, and 4 and the third to 5th Defendant. 5th Defendant however denies the alleged adoption (1) of Sindu by Dorasami and (2) of third Defendant by Sindu, and claims that he, as representing Chinnasami's branch is entitled to a share equal to that of Defendants 1 to 4 jointly as representatives of Rangasamy's branch. The questions for decision with reference to this contention are consequently two, namely, (1) was Sindu adopted by Dorasami? and (2) was 3rd Defendant adopted by Sindu? The Sub Judge has found in the affirmative with regard to both these adoptions. The evidence is considered in paragraphs 33 to 35 of his judgment.

The evidence of witnesses who speak to the adoption of Sindu by Dorasami is supported by Exhibit IV, an Inam statement prepared in 1862, in which Sreenivasa Iyengar is entered as the adopted son of Komalavalli the widow of Dorasami Iyengar. 3rd defendant's 2nd witness by whom the statement was prepared swears that it was prepared on information given by the father of 1st and 5th defendants and their brother Periasami, the father of 7th defendant's husband. Exhibits II and III are decrees in two suits of 1869 in which Sindu Iyengar was defendant and described as adopted son of Dorasami. There are also a number of other documents produced in which Sindu is described as Dorasami's son—Cf. Exhibits XIII, XVII, XX, XXIX, &c. It is true that 5th defendant was not a party to these last mentioned documents but, nevertheless, they are admissible as corroborating the oral evidence of both Plaintiff's and 3rd defendant's witnesses.

As to 3rd defendant's adoption by Sindu Ayyangar, there is the evidence of defendant's 6th and 7th witnesses and also of plaintiff's 8th witness all of whom say they were present when the adoption took place, while other witnesses speak to the performance

by 3rd defendant of the exequial rites and Sraddhas of Sindu and of Dorasami's widow Komalavalli.

The finding of the Sub-Judge as to these two adoptions is thus supported by evidence which we see no reason for holding to have been misappreciated, nor do we see reason to differ from the finding of the Sub-Judge on the 4th, 5th, and 6th issues. We also agree with him in finding that the 7th defendant's late husband was an undivided coparcener at the date of his death.

The next question is as to the validity of the transfer evidenced by Exhibit LVIII executed by 7th defendant's late husband to the 6th defendant. It was the subject of the 8th issue recorded by the Subordinate Judge. The Sub-Judge has found that though 7th defendant's late husband could not convey any definite portions of the undivided family property, he could convey his undefined interest and share in the same and that to this extent the conveyance under LVIII is valid, and 6th defendant stated his readiness to accept his vendor's share whatever it comes to. As pointed out by the Sub-Judge the consideration for the conveyance is Rupees 40,000, of which Rupees 8,000 odd were paid to one Sadagopachary under Exhibit XXXIII, Rupees 11,000 odd to N. Saminatha Iyer by whom were granted the receipts XXXII series (which are admitted by him as a witness examined on commission) and the remaining Rupees 21,000 were to be paid to 8th defendant, the father of 7th defendant, for the purpose of liquidating other debts of the executant of LVIII. The evidence on the point is stated in paragraph 40 of the Sub-Judge's judgment. There is no reason for holding that this sale to 6th defendant was not for valuable consideration or that 6th defendant purchased benamee for the plaintiff. According to the Law administered in this presidency, a sale by a coparcener of his undivided interest in family property is clearly valid and gives the vendee a right to claim the share of his vendor, though not any specific property. It is clear however from Exhibit LVIII that what was sold thereby to 6th defendant is 7th defendant's late husbands' share in immoveable property only of the joint family excluding therefrom the "old, tiled, full-built dwelling house" situate in the southern row of Mela Valuttur. The decree of the Lower Court must be amended accordingly by excluding from the portion to be awarded

to the 6th defendant the above house and Kristnasamy Iyengar's share in the moveable property.

The next question is as to the properties specified in Schedule H, which consist of 34 items. It is contended for the 7th defendant that items 4 to 28 were acquired by her deceased husband, that she had yet realized nothing from the policy of insurance on his life, that item 32 which was also her husband's self-acquisition was conveyed by him for the purpose of conducting a charity to one Tata Desikachariyar of Triplicane who was not made a party to this suit, and that under Hindu Law she was entitled to take her husband's self-acquisition in preference to his co-parceners and that no other items of Schedule H, were in her possession. As regards items 29, 30 and 31, it was urged on behalf of the 8th defendant, father of the 7th defendant, that he acquired the first two items by purchase and that they did not belong to the joint family and that item 31 was bought by him on the 19th July 1888 at a court sale. As for items 29, 30, 31, 33 and 34 he alleged that even supposing that they all belonged to his son-in-law, Kristnasamy Iyengar, the latter ceased to be a co-parcener in consequence of the sale of his undivided share to the 6th defendant, and that the 7th defendant was the lawful heir entitled to succeed to it upon her husband's death. With reference to items 1 to 3 in Schedule H, the 9th defendant's case was that they belonged exclusively to the 7th defendant's husband, and he purchased them at a revenue sale for arrears of revenue due to the Government by Kristnasamy Iyengar. As regards all the above items, the plaintiff averred in paragraphs 5 and 6 of his plaint, that out of the sale amount, *viz* Rs. 40,000 due by the 6th defendant to 7th defendant's husband, the latter paid his father-in-law, the 8th defendant, Rs. 21,500 which was the surplus that remained after payment of his debt, in order that the father-in-law might purchase land for him, that the items in dispute were so purchased, and that the coparceners of the 7th defendant's husband were entitled to recover them from defendants 6 to 8. As to this sum of Rs. 21,500, 8th defendant contended that it was paid to him out of the purchase-money, not to be invested as alleged in the purchase of land for the benefit of 7th defendant's husband, but in payment of debts due by him to the 8th defendant, of monies lent at his intercession and of debts which he was requested to liquidate. The 8th defendant

stated also that the 6th defendant executed a promissory note in his favour for Rs. 21,150 at the date of the sale to him, and that he obtained a decree upon the promissory note against the purchaser and recovered from him after decree Rs. 7,410. He alleged further that the plaintiff's case that Rs. 9,000 remained with him as unexpended balance of the sale amount *viz.*, Rs. 40,000 was false.

These contentions formed the subject of the 9th, 10th, and 16th issues and the Subordinate Judge decided them all against the plaintiff on the ground mentioned in paragraph 41 of his judgment *viz.*, that the plaintiff's Vakil who argued the case said that the properties in Schedule H were claimed very unwarrantably. The contention in appeal is that this is not a proper or sufficient disposal and we think that it is entitled to weight. The opinion expressed by a Vakil in the course of argument adversely to a claim which he undertook to advocate is not binding on his client, when it is not in accordance with the law applicable to the case and it is clearly not binding on the other contending defendants.

The question arising on these contentions is, whether when a co-parcener sells his undivided share and when a surplus is left after paying his debts from the sale proceeds, that surplus is co-parcenary property subject to the right of survivorship vesting in other co-parceners, or his self-acquired property devolving upon his demise on his childless widow. The Subordinate Judge apparently considers it to be the deceased co-parcener's separate estate, but we are unable to concur in this opinion. It has been held by this court that a co-parcener can only alienate his undivided share for value and that he cannot alienate it by will or gift.

The law on this subject, as administered in this Presidency was explained by the Privy Council in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, L. R, 6 I. A, 88 pp. 101 and 102. Their Lordships say that "since the decision of the cases reported in *Virasami Gramini* v. *Ayyaswami Gramini*, 1 M. H. C. R, 471, *Peddamuthulaty* v. *N. Thimma Reddy*, 2 M. H. C. R, 270 and *Palanivelappa Goundan* v. *Mannaru Naikan*, 4 M. H. C. R, 60, it has been settled law in the Presidency of Madras that one co-parcener may dispose of ancestral undivided estate, even by contract and conveyance, to the extent of his own share; and *a fortiori* that such share may be seized and sold in execution of his separate debt." It is also

pointed out that the law obtaining in the Presidency of Bombay differs from that administered in this Presidency to this extent *viz.*, that in the former the alienation must be for value, whilst in the latter, an alienation by gift was recognised. The judicial committee proceeded to observe that "there can be little doubt that all such alienations are inconsistent with the strict theory of a joint and undivided family and the law as established in Madras and Bombay has been one of gradual growth founded on the equity which a purchaser for value has to be allowed to stand in his vendor's shoes and to work out his rights by means of a partition."

In paragraphs 331 to 334 of Mayne's Hindu Law the learned writer gives the history of Hindu Law on the alienability of an undivided share by a co-parcener as administered in this Presidency. The decisions passed subsequent to the date of the decision of the Privy Council and reported in *Baba* v. *Timma*, I. L. R, 7 M, 357 and *Ponnuswami* v. *Thatha*, I. L. R, 9 M, 273, show that a coparcener is not at liberty to alienate his undivided interest by gift, except when he is expressly authorized to do so by a text of Hindu Law, because the equity which exists in favour of a purchaser for value does not arise in favour of a donee who is a mere volunteer. In the former case the question was fully discussed by a Full Bench of this court and the conclusion arrived at is that a co-parcener has no power to alienate his undivided interest by gift, unless such gift is sanctioned by an express text of Hindu Law. As regards devises by will, it was held that at the moment of death the right by survivorship arises and as it is in conflict with the right by devise, the former prevails as the prior right against the latter. The law applicable to the alienation of an undivided share may thus be summarized. It may be alienated for value, but not otherwise, except where a gift is expressly sanctioned by Hindu Law and the equity of the creditor or the purchaser is the foundation on which the power to alienate for value rests.

If a coparcener then sells his undivided interest for Rs. 40,000 of which a part is only applied to payment of his debts and the rest is either retained by him, or by some one else in trust for him, or laid out in the acquisition of other property, the right of survivorship attaches to the surplus so retained or to the property in which it has been invested. For the sale, so far as it produces the

surplus, was in excess of the requirements of the creditor's equity and amounts to a mere conversion of the co-parcenary interest into money or other property which, when warranted neither by Hindu Law nor by the equity engrafted upon it, cannot operate to remove it from the domain of survivorship or to divest the surplus of its character of co-parcenary property. Suppose that a co-parcener alienates his undivided share only in part of the joint property and that it is sufficient to satisfy the equity of the creditor, it cannot be pretended that his share in the rest of the joint property is hereby changed into his separate property and we consider that the same principle ought to govern the unexpended surplus which it is not necessary to raise or the property on which it happens to be invested. Although the sale may be upheld because the purchaser has the equity to stand in the place of the vendor and to work out his rights by partition, as he has paid value for his purchase, the purchase-money, except so far as it is applied to payment of debts continues to be co-parcenary property. There are no doubt decisions to the effect that when a co-parcener's share is alienated, the alienor ceases to be a co-parcener *quo ad* the property so alienated and the co-parcenary is thereby determined *pro tanto,* inasmuch as the purchaser who is a stranger to the joint family cannot be a coparcener. But they do not establish the proposition that the sale-proceeds, when they are not paid to a creditor in whole or part but retained by the co-parcener, cease likewise to be co-parcenary property. The Subordinate Judge must be requested to come to fresh findings on the contention of the plaintiff and the other co-parceners and 7th, 8th and 9th defendants in regard to the several items of property mentioned in Schedule H including Rs. 9,000 and pass a final decree with reference to those findings and the foregoing observations on the law applicable to the case.

There are several minor points as to which the Subordinate Judge has come to no finding though it was desirable to do so before passing a provisional decree.

It is first urged that the Subordinate Judge has recorded no finding on issues 21 to 24. As to issues 23 and 24 the Sub-Judge has expressed, as his opinion, in paragraph 40 of his judgment that the sale to the 6th defendant was not benami for the plaintiff as alleged by him and in this opinion we concur. The question of fraud suggested by the 23rd issue must also

be negatived, for we are referred to no evidence in its support, while it is clear that the 6th defendant paid full value for his purchase. No distinct findings are however recorded on the 20th and 22nd issues and we think they must be included among those which remain to be adjudicated upon before a final decree is passed.

Another matter urged upon is that the 6th defendant acknowledged in exhibit 62 that he collected monies due on some of the bonds belonging to the joint family and that the Subordinate Judge has not expressed his opinion as to the amounts collected by him and as to whether he has duly accounted for them. The Subordinate Judge must be requested to come to a distinct finding on the matters mentioned above as he probably intended to do whilst deciding the 11th and 12th issues which he has reserved for adjudication before final decree. As regards the sum of Rs. 8,000 claimed under the deed of management, the Subordinate Judge observes, and we think correctly, that plaintiff who was not a party to exhibit 78 is not bound by it. In the absence of a valid special agreement, the managing coparcener of a joint Hindu family is clearly entitled to no special remuneration as the property which he manages is one of which he is a joint owner.

Another contention argued in Appeal is that 89 documents which admittedly relate to family properties were handed over to the 6th defendant under Exhibit 75 by way of guarantee and that the Subordinate Judge has not noticed the objection raised by the guarantee. As an individual co-parcener the 7th defendant's husband was not entitled to charge joint property (as he did) by way of indemnity without the consent of the other co-parceners. The 6th defendant admits as the 17th witness for the defence that those documents are with him and we think that the indemnity should be set aside and that provision should be made in the final decree for the return of those documents. As regards the 19th issue the Subordinate Judge states that there is no evidence in regard to it and we adopt his finding so far as it relates to Plaintiff and we leave it, so for as it relates to 7th defendant, to abide the result of the further enquiry which we have ordered.

It only remains for us to notice the preliminery objection taken on behalf of the 8th defendant that the decree passed by the Subordinate Judge is incomplete and that no appeal lies

until there is a complete and final decree. We are of opinion that this objection cannot be supported. A decree is defined by section 2 of the Code of Civil Procedure, and it implies that an order directing accounts to be taken is separable from the rest of the decree adjudicating on the rights claimed or the defences set up in the suit. A provisional decree is clearly appealable, and the decree before us appears to us to be in the nature of a provisional decree. The decision of the Privy Council reported in I. L. R, 11 M, 83 and Section 540 of the Civil Procedure which allows an appeal from part of a decree support that view. A provisional decree is permitted to be passed by Section 215 in a suit for dissolution of partnership, and a partition suit which has for its object the determination of the co-parcenary is similar to it. The decree before us is however somewhat defective in form. A provisional decree ought to declare the several rights and liabilities which have been adjudicated on and embody an order similar to the one contemplated by Section 215 and Section 215 A. The decree passed by the Subordinate Judge will be so amended as to declare all the rights and liabilities which have already been adjudicated on and contain directions as to what remains to be done *viz.*, that an account be taken in respect of the matters mentioned in issues 11, 12, 13, 15, 20 and 22, and that further enquiry be made as to the properties mentioned in schedule H as herein directed, and that the result of such enquiry be embodied in the final decree.

The costs in the Original Court will be reserved for adjudication when the final decree is passed. The costs of this appeal will follow the result and be provided for in the decree to be passed by the Subordinate Judge.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Sathianama Barathi ... ... Appellant (*2nd Plaintiff.*)*

v.

Saravanabagiammal and others ... Respondents (*Defendants.*)

* A. S. No. 109 of 1892. 1st May 1894.

Sathianama Barathi. v. Saravanabagiammal.

Limitation Act XV of 1877, S. 10—Alienation by head of a Mutt—Suit by a successor—Permanent occupancy by alienee.

Where properties had been granted for the support of a Mutt and for other religious purposes and by the usage of the institution, the descendants of the grantee were also maintained out of its income, *held* that an absolute alienation by the head of the Mutt to his brother of some of the properties in lieu of maintenance was invalid and would only be upheld during the lifetime of the brother and of the members of his family. *Held* also that the possession by the alienee of the properties for a long period and the granting of patta to him cannot confer a right of permanent occupancy upon him.

Where such alienation was made in 1842 by the then head of the Mutt and a suit is brought by his successor in 1886 for the recovery of the properties for the Mutt from the widow of the alienee, *held* that the suit is not barred as it falls within S. 10 of Act XV of 1877.

Appeal against so much of the decree of the 2nd Subordinate Judge of Tinnevelly in Original Suit No. 46 of 1886 as rejects 2nd Plaintiff's claim to the Kudivaram right in the plaint mentioned lands.

The facts of the case appear sufficiently from the judgment.

V. Bashyam Aiyangar for appellant.

V. Krishnaswamy Aiyar for 1st respondent.

P. Anantha Charlu and *Varadiah* for 2nd respondent.

V. Bhashyam Aiyangar :—The Sub-Judge having held the alienation of 1842 invalid, as it was not for a purpose binding on the institution, he should have decreed the plaintiff's claim. There is no plea of a right of occupancy set up and none can be acquired by the defendants.

V. Krishnaswami Aiyar :—The memo of objections raises the principal questions in the case. The grant was for the maintenance of the grantee and his descendants and for certain religious and charitable purposes. The grant was for the benefit of the grantee subject to a trust, or at all events it was for certain charitable purposes and for maintenance. Where the deed of endowment is not clear, evidence of the usage of the institution is admissible to prove the purpose of the grant. The usage in this case is clear. Grants for maintenance have always been made by the head of the Mutt Secondly. The suit is barred by limitation. Section 10 of Act XV of 1877 does not apply. This is the same as S. 25 of 3 and 4 Will. IV Ch, 27. That section specifies that the suit should be by beneficiaries, if limitation is not to apply. The same construction should

be placed on S. 10. Thirdly. The Sub-Judge finds that the alienee was entitled to be maintained out of the income. The grant is in lieu of that. He was herefore an assign for consideration. A mortgagee and a permanent lessee have been held to be assigns for valuable consideration—*Yesu Ramji Kalnath* v. *Balkrishna Lakshman*, I. L. R, 15 B, 583. Here the grant in 1842 was in lieu of a maintenance properly payable, and twelve years having elapsed from that date the suit is barred.

V. Bhashyam Aiyangar (in reply) :—Maintenance of the grantee's family is not one of the objects specified in the endowment deed, Subsequent usage cannot alter the nature of the endowment. The alienation is wholly invalid. The plaintiff has brought his suit within twelve years from the time when his right accrued. He is therefore in time—*Mahomed* v. *Ganapati*, I. L. R, 13 M, 277, *Jamal Sahib* v. *Murgaya Swami*, I. L. R, 10 B, 34. The English Act has no application. The trustee can sue on behalf of the beneficiaries, S. 437, Civil Procedure Code.

JUEGMENT :—This was a suit to recover with mesne profits possession of the properties specified in the plaint from the defendants. The ground of claim is that they are comprised in the endowment of a Gosami Mutt and that they are improperly alienated to or retained by the defendant. The 1st Plaintiff was the chief or representative of the institution and upon his demise, the 2nd Plaintiff was brought in as his legal representative.

The Mutt is situated at the Village of Manthithope in the Ottapidaram Taluk of the District of Tinnevelly. After its founder, it is known by the name of Srimat Sankara Bharati Swami Adinam. In the Village of Manthithope, there are about 20 families of Gosamies who claim to be descendants of the original grantee and several of them are in possession of small portions of the endowments. The entire village was granted free of assessment to Sankara Bharati according to the Plaintiff, for the support of the Mattam and its charities. A Gosami is not a religious ascetic like a Sanniyasi or Tambiran who abjures the world and its pleasures and lives a life of celibacy—but a married man who is considered to live a pious life affording religious instruction to those who seek it from him—performing religious charities and delivering lectures on religious subjects and on the duty of man to God and to his fellow

creatures. The specific trusts to which the income of the village is applicable according to the usage of the institution are found by the subordinate Judge to consist (I) in the distribution of Sadavritti (rice and condiments supplied in lieu of cooked food) in the Mutt to Gosayi and other pilgrims who pass through Manthithope' (II) in the maintaining of *Puja* or worship in the temple called Sankara Bharatiswami Kovil, (III) in supporting a watershed or pandal at a place near the village called Ellentope and (IV) in providing maintenance to the descendants of the grantee. The eldest male representative of the eldest son of the grantee succeeds to the dignity of the chief of the Mutt and holds the village save such portions of it as have been alienated to others.

The properties forming the subject of this litigation are those parts of the Mattam endowment which have passed into the possession of the defendants. The 1st defendant's husband, Nataraja Bharati Gosamiar, was the brother of the 1st plaintiff's father, Sivaprakasa Bharati Gosami and on the 22nd May 1842, the latter executed in favour of the former the agreement (XIV) by way of making a provision for him and his family. The document purports to have been executed "in accordance with the practice of our *adinam.*" It gives 1st defendant's husband certain lands and promises to give him a house and some jewels, utensils and cows &c, soon after he is married. In return for this settlement, the 1st defendant's husband covenants to the following effect, "I shall continue to enjoy the aforesaid properties from generation to generation and for ever shall conduct myself in accordance with your wishes and orders." After marrying the 1st defendant, her husband left the village about thirty years ago and has not since been heard of and the land granted by Exhibit XIV passed into her possession on the 4th September 1885. She mortgaged it for Rs. 1,200 to the 2nd defendant, Anandanada Pillai, a stranger to the families of the descendants of the original grantee. As regards this land, the plaintiff's case is that the agreement XIV is invalid, that the land was granted in consideration of certain services which the first defendant's husband was to render in the Mutt and on the understanding that it was to revert to the Mutt, either in case he failed to render those services or died without male issue. On the other hand, the first defendant's contention is that the grant was not a service grant, that Exhibit XIV granted

an absolute estate and that the plaintiff's claim was barred by limitation. The 2nd defendant's contention was to the same effect, except that he also set up against the plaintiff the mortgage in his favour. As regards items of lands 1, 2, 15 to 17 and 19 to 21, the plaintiff's case was that the 3rd defendant obtained them from the 1st Plaintiff's father on a patta for cultivation about 9 years ago and that he was bound to give them up on demand. But the 3rd defendant alleged that the original 1st plaintiff's father granted the lands in perpetuity for valuable consideration and that the 1st plaintiff ratified that grant by issuing pattas for the Andus 1054 and 1055 or the years 1879 to 1880.

Five issues were originally framed in this case. On the first issue, a former Sub-Judge found that the lands in dispute belonged to the Muttam, on the 2nd issue, he held that the land which passed into the possession of the 1st defendant's husband was not held by him on service tenure, on the 3rd issue, he was of opinion that the claim was barred by limitation, on the 5th issue, he found that the settlement made by the 1st plaintiff's father was binding on his successors and upon those findings he dismissed the suit with costs.

In appeal, however, this court set aside the decree on the ground that the investigation was defective and remanded the case for re-trial. With reference to the order of remand, four more issues were framed and the defects in the original inquiry remedied. In the 6th issue, the Sub-Judge found that the specific trusts of the Gosami Mutt were as already mentioned; on the 7th issue, he held differing from his predecessor that the maintenance of the descendants of the original grantee was a legitimate charge only on the income of the endowment and that the allotment of land made over to the 1st defendant's husband was not valid. On the 8th issue, he was of opinion that document XIV was genuine but that it was not valid so far as it related to allotment of land. He found, however, that the Head of the Mutt was entitled to the rent, but not to possession of the lands sued for.

As for the 9th issue, which related to the occupancy right set up by the 3rd defendant, the Subordinate Judge found in his favour. In the result he passed a decree declaring that the head of the Mutt possessed only the right of collecting rents due on the lands sued for under the provisions of the Rent Recovery Act for

the benefit of the Mutt and the charitable institutions attached thereto and dismissing the rest of the plaintiff's claim. He directed the plaintiff to pay the costs of the 3rd defendant and 1st and 2nd defendants and plaintiff to bear his own costs. Against this decree the plaintiff has appealed and the 1st and 2nd defendants have objected to it under S. 561, Civil Procedure Code in so far as it is against them.

The first objection taken in appeal is that the suit is barred by limitation and that S. 10 of the Limitation Act is not applicable to a suit brought by a person succeeding to the office of a trustee. Reliance is placed on 3 and 4 William IV, Chapter 27, S. 25; S. 10 of the Indian Act of Limitations specifies as exempt from its operation suits against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns not being assigns for valuable consideration, for the purpose of following in his or their hands such property; unlike the provision of the English Act, S. 10 does not state that the plaintiff ought to be a beneficiary or beneficiaries, whilst according to S. 437 of the Code of Civil Procedure a trustee represents the persons beneficially interested when the suit is concerning property vested in a trustee, and the contention is between the persons beneficially interested and a third party. It must be remembered that the plaintiff is not the alienor and as the present manager of the Mutt, he is entitled to sue the assigns of his predecesor in office on the ground that the assignment was in violation of the trust. This view is in accordance with the decisions reported in *Mahomed* v. *Ganapati*, I. L. R, 13 M, 277 and *Jamal Saheb* v. *Murgaya Swami*, I. L. R, 10 B, 34.

It is next urged on appellant's behalf that the Subordinate Judge is in error in holding that appellant was only entitled to rent and not to actual possession of the land in dispute. The Subordinate Judge considers that if pattas are issued under Act VIII of 1865, landholders are not entitled to eject their tenants but can only claim rent. He appears to have misconstrued S. 12 which regulates the mode of ejectment and provides that the landholders specified in S. 3 are not empowered to eject their tenants from their lands except by a decree of court or under S. 10 or 41 of the Act. In the true construction of S. 12, the issue of a patta is clearly not intended to do more than prevent arbitrary ejectment

of tenants or to give them a right of permanent occupancy, though the grant or contract under which their possession commenced creates either a limited estate or a terminable holding. The Subordinate Judge refers in paragraph 31 of his judgment to an admission by plaintiff that 3rd defendant has been in possession under a lease granted by 1st plaintiff's father for 9 years, but this circumstance is not sufficient to support the finding that the former has a permanent right of occupancy. In our judgment the appellant's contention must prevail.

The real question then is whether, having regard to the grant or contract under which defendants' possession commenced, they were entitled to continue in possession and legally resist plaintiff's claim to eject them. Exhibit XIV is the Kararnamah on which 1st defendant's title rests and we agree with the Sub-Judge that that document is genuine. There is no doubt that it is not a mere maintenance grant but a grant of an absolute estate as alleged by 1st and 2nd defendants. The words "from generation to generation" and the absence of any clause prohibitive of alienation are consistent only with the view that the intention was to create an absolute estate not a limited one merely. That this is the proper construction to be put on the document XIV is confirmed by the terms of similar grants made by some of the plaintiff's predecessors to their brothers. As recited in document XIV it appears to have been customary in the *Adinam* for the head of the Mutt for the time being to make a provision for his younger brother by grant of land to him and his heirs. This brings under our consideration the contention on Respondent's behalf that the original grant of the village of Manthithope was not a grant of an endowment in trust for the Mutt and the charities connected therewith, but a grant of property to the original grantee on which certain trusts were engrafted so as to impose on him an obligation to apply a portion of the income of the village to those trusts. We do not consider that this contention is tenable. The Sub-Judge discusses the evidence on the subject under the 1st issue and decides that issue in plaintiff's favour. But the 1st and 2nd Respondent's pleader draws our attention to Exhibits W, R, T, Q, 27, 31, 32, 14, 17, 28, 29, and 30, to Exhibits 15, 16, 18, 19, 20 21, 25 and 26 and to the oral evidence of plaintiff's witnesses 1, 2, 7, 10, and 4 and of defendant's witnesses 2, 3, 8, 9, and 10. Exhibit

W is the original grant dated Andu 719 (1544) and purports to be a grant of the village of Manthithope made by Viswanatha Nayak's Dewan Thiruvengada Nadha Naiker to Sankara Bharati Tamburan to be held and enjoyed free of assessment so long as the sun and moon endure from generation to generation. It says that the grantee is "thus to improve the Mutt, maintain the charity and be happy." There is no allusion in the inscription to maintenance and the grant contemplates the improvement of the Mutt and the maintenance of the charity as its primary object. Stress is laid on the words "from generation to generation" and on Sankara Bharati instead of the Mutt being named as the grantee. But this is not conclusive. The subsequent usage of the institution and several other Exhibits in evidence are inconsistent with this contention and show that Sankara Bharati was probably named as the grantee because the Mutt was his Mutt.

Exhibit R, is the Inam title deed dated 1st February 1866. It was issued to the manager for the time being of Sankara Bharati Tambiran Mutt by the Inam Commissioner on behalf of the Governor in Council. It confirms the village to *the manager and his successors tax-free to be held without inteference "so long as the conditions of the grant are duly fulfilled."* It is not possible to reconcile this document with the respondent's contention. Exhibit B is the register of Inams prepared by the Inam Commissioner. In that it is recorded that the grant was made for the support of the Gosai Muttam at Manthithope and that the Muttam is well kept up. Exhibit C is the Inam statement put in by the plaintiff's father and the grant is described in it as made by the former Government for the maintenance of the charities conducted in Sankara Bharati Tambiran's Muttam.

Exhibits T and Q are yadasts addressed by Tahsildars to Plaintiff's father which tend to show that the object of the grant was as found by the Subordinate Judge. They are dated respectively in 1872 and 1882. It is contented on behalf of the first defendant that they are not evidence against her. They are admissible however, as indicating the general consciousness as to the nature of the grant.

Exhibit 27 is the Ayakat account of 1803 in which the village of Manthithope is entered as "Suddamaniam Village belonging to Gosamiars." There is nothing to indicate that the object with

which it has prepared was to show the precise nature of the grant and it is not safe to attach weight to it.

Exhibits 31 and 32 only show that it was customary for the chief of the Mutt for the time being to allot lands for the maintenance of his Junior sons when he has several sons and to his brothers and that this practice was followed in 1879 and 1877. Exhibit XIV under date May 1842 which is the grant relied on by 1st and 2nd defendants shows that prior to it there had been similar grants.

Exhibit XXVIII is a Jamabundi account and gives no useful information.

Exhibit XVII which was a grant for maintenance made in 1888 describes the usage of the Mutt as regards such grants in the following terms: "As among the hereditary descendants of our *adinan,* be the number of brothers what it may in each generation, when the eldest of them who is the heir-apparent to the dignity comes to be the head of the Mutt it has been the practice with such eldest brother to allot to his younger brothers for their maintenance certain lands, maniyams, houses and grounds and such other properties as may be sufficient therefore and thus to separate them after obtaining from them written agreements for the same."

Exhibits XXIX and XXX are the Razinamahs in O. S. 381 of 1861 and the written statement in O. S. 139 of 1860. They also show that maintenance grants were usually made and no partition was allowed.

The other Exhibits to which Respondent's pleader has drawn our attention are hypothecation bonds and mortgages executed by those to whom lands were granted for maintenance. The effect of the oral evidence is sufficiently stated by the Subordinate Judge and it is unnecessary to recapitulate it.

Neither the oral nor the documentary evidence proves the Respondent's case that the village was originally granted as private property and not as an endowment. The evidence taken as a whole points to the conclusion that the village was granted as an endowment for the Mutt and the charities connected therewith. Having regard to the usage of the institution, the specific trusts are (1) the up-keep of the Mutt (2) the distribution of Sadavarties

to Gosayi pilgrims (3) the performance of puja in Sankara Bharati Swami Kovil (4) the maintenance of watershed at Ellantope and (5) the support of the descendants of the grantee.

The evidence does not show that at each generation the village was divided subject to the obligation of contributing to the cost of maintaining the charities or that any portion of the village was specially set apart as trust property and the rest as partible property, as would ordinarily be the case, if the villages were granted for the personal benefit of the grantee and his heirs, subject to the fulfilment of certain trusts annexed to the grant. The conclusion to which we come is that the village was granted as an endowment for the Mutt and the charities connected with it and that what might remain after the due execution of those trusts was intended to be applied to the maintenance of the grantee or his descendants. It has no doubt been usual from before 1840, for the head of the Mutt for the time being to make provision for his brother or junior sons, but such grants would be valid only if they were real maintenance grants. The Subordinate Judge considers that only money payments should have been made and that no lands ought to have been allotted. We do not concur in this opinion. Whether maintenance is provided by an assignment of land or paid in cash from time to time, there is no difference in principle, provided that the allotment is purely by way of providing maintenance. That which vitiates the allotment is its character as an absolute grant and the grant is bad to that extent. The first defendant being by marriage part of the family of a descendant of the grantee the grant should be declared to be valid during her life and liable to revert to the representative of the Muttam or her death. The decree of the Subordinate Judge must therefore be set aside so far as it declares that the plaintiff is entitled to rent and a decree be passed declaring him entitled to hold the lands on and after the demise of the first defendant. Each party will bear his or her own costs.

PRIVY COUNCIL.*

Present:— Lords Hobhouse, Macnaghten, and Morris and Sir Richard Couch.

Cherukunneth Manakel Nilakandhen Namboodiripad (1st *Plff.*) v. Vengunat Swaroopathil P. R. Varma Valia Nambidi and others. (*Defendants*).

Nilakandhen Namboodiripad v. P. R. Varma Valia Nambidi.

Trust Compromise—Usage—Its binding character,

When the predecessors of the parties had on two previous occasions in 1845 and 1874 entered into a compromise as to certain disputes between them with regard to the trusteeship of a temple and that compromise was acted upon for a series of years, their Lordships *held* that the compromise was binding upon the parties and their successors and could not now be questioned upon any theory of the extent of the right of either party in the abstract. The usage which had existed so long was the best exponent of their rights which was twice acquiesced in by the plaintiff's ancestors in legal proceedings in which opportunity was afforded of a diffinite decision as to the rights of the respective families.

This was an appeal against the judgment and decree of the High Court of Judicature at Madras dated the 28th November 1890. The facts of the case will appear sufficiently from the following judgment of their Lordships which was delivered by *Lord Morris*.

The appellants are the plaintiffs in a suit which was dismissed by the Subordinate Judge of South Malabar on the 10th December 1888 and was again dismissed on appeal by the High Court of Madras on the 28th November 1890. The appellants sought for a declaration that they as *Urallers* were entitled to the exclusive management of the affairs of the Temple of Kachankurissi, and that the respondents had no right over, or right of management in, the said Temple, an ancient Hindu Temple of such antiquity that nothing is known as to its foundation or original constitution. The respondents are the representatives of the original rulers of the district in which the Temple is situated, who so continued till the British sovereignty was established over the country in the year 1792. The family of the appellants appear to have always held the office of *Urallers* or Managers of the temple, while the Nambidi possessed certain sovereign rights of superintending the Temple, called *Melkoima* rights. As long since as the year 1845 disputes arose between the ancestors of the appel-

* 20th July 1894.

lants and respondents, and a suit was commenced as to the management of the Temple, which was settled by a *Karar* on the 16th August 1845; and in accordance therewith the parties two days afterwards filed a *Razi* withdrawing the suit. The *Karar* provides that the affairs of the Temple were to be managed and that the ceremonies were to be performed jointly "just as they were hitherto" and for a period of 30 years afterwards, namely until 1874, that arrangement was carried out. In 1874 fresh disputes sprang up between the *Urallers* and the Nambidi, and led to a suit in which the *Urallers* sought to recover certain lands belonging to the Temple from a tenant who held under a demise granted by the *Samudayam* appointed by the Urallers and the Nambidi according to the agreement contained in the *Karar* of 1845. This suit was compromised, and in a *Razi* of the 21st November 1874, terms were set out, which again determined that there should be a joint management of the affairs of the Temple by the Urallers and the Nambidi. This *Razi* was acted upon until the date of the present suit, the Urallers and the Nambidi jointly appointing a *Samudayam* and a *Pattawali*, and joining in suits to recover temple lands and in applications to execute decrees.

Their Lordships are of opinion that the state of things which has admittedly continued since 1845, and which was probably the state existing before that time and since the establishment of British Sovereignty, cannot now be questioned, and that the compromise of their rights entered in 1845 and 1874 by the Urallers and Nambidi is binding upon them and their successors, and cannot be now reopened upon any theory of the extent of the *Melkoima* right in the abstract. The usage which has existed for so long a period is the best exponent of the *Melkoima* right vested in the respondents, a right twice acquiesced in by the appellants or their predecessors in legal proceedings in which the opportunity was afforded of a definite decision as to the rights of the respective families. Their Lordships will therefore humbly advise her Majesty that the judgment of the High Court ought to be affirmed and the appeal dismissed. The appellants must pay the costs of the appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Muthuswami Aiyar.

Jambuvien ... .. . Appellant (*Plaintiff*).*

v.

Venkatarayar .. ... . Respondent (*Defendant*).

Civil Procedure Code, Act XIV. of 1882, S 360.

Jambuv[illegible]n v. Venkat[illegible]

A Court other than the District Court invested with insolvency jurisdiction under S. 360 of the Code of Civil Procedure may entertain an application under S. 344 by any person who has been arrested or imprisoned or against whose property any order of attachment has been made whether in execution of a decree for money passed by that court or a decree passed by an appellate court in confirmation, reversal or modification of the decree of that court.

Appeal against the order of the Subordinate Judge of Tanjore dated the 21st May 1891, passed on miscellaneous insolvency petition No. 2 of 1890.

The facts of the case appear sufficiently from the following judgment of the High Court.

P. S. Sivaswami Aiyar for the appellant.

M. O. Parthasaradhi Aiyangar for the respondent.

JUDGMENT :—It is urged in support of this appeal that the jurisdiction of the Subordinate Judge in insolvency matters is limited to decrees actually passed by himself and does not extend to decrees passed on appeal from his decrees by the appellate court although the suits in which they are passed are cognizable by him. In support of this contention reliance is placed on the wording of S. 360 of the Code of Civil Procedure. That section is in these terms :—"The Local Government may by notification in the official Gazette invest any court other than a District Court with the powers conferred on District Courts by Ss. 344 to 359 of the Code of Civil Procedure and the District Judge may transfer to any court situated in his District and so invested any case instituted under S. 344. A court so invested may entertain an application under S. 344 by any person who has been arrested or imprisoned or against whose property any order of attachment has been made in execution of a decree for money *passed by that court*." The argument is that the words 'passed by that court' are words of limita-

* C. M. A. No. 42 of 1893. 6th August 1894.

tion and do not include decrees under execution, if they are passed by the appellate court in appeal.

By S. 344 plenary jurisdiction is conferred on District Courts subject to the condition precedent that the judgment-debtor is arrested or imprisoned in execution of a decree for money or that an order of attachment is made in execution of such decree. By the first clause of S. 360, power is reserved to the Local Government to confer on any court other than a District Court the powers conferred on District Courts by Ss. 344 to 359. These two sections, if nothing more appeared, would disclose an intention to enable the Local Government to confer co-ordinate jurisdiction. As courts other than District Courts may have limited pecuniary jurisdiction over suits, the words "in any decree passed by that court" are inserted. The occasion when the jurisdiction arises is arrest or imprisonment or attachment in execution of a money decree. The reasonable construction is that the words "decree for money passed by that court" mean decrees passed by that court in suits which are cognizable by it or decrees passed in appeal in confirmation, reversal or modification of those decrees. For purposes of execution, the decree passed by an appellate court is on the same footing with the decrees passed by the original court itself. Whenever there is an appeal, the final decree capable of execution is the decree passed by the appellate court, whether it confirms, modifies or reverses the original decree. And if the appellant's contentions were to prevail, all decrees from which appeals are preferred would cease to be decrees passed by the original court for purposes of execution. There would also be this anomaly. A Subordinate Judge would have insolvency jurisdiction over one defendant who did not prefer an appeal and have no insolvency jurisdiction over another defendant in the same suit who preferred an appeal from his decree. At the last hearing when this court directed the District Court to return the appeal preferred to it for presentation to the High Court, this objection was not taken. I dismiss this appeal with costs on the ground that the construction which ought to be placed on a statute should be such as fairly and reasonably executes the intention of the legislature where that intention is plain.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusamy Aiyar and Mr. Justice Shephard.

Sri Balusu Gurulingaswamy ... ... Appellant (*Plaintiff*).*

v.

Sri Balusu Rama-Lakshmamma and another. } Respondents (1st and 2nd *Defendants*).

Hindu Law—Suit by remote reversioner to set aside an adoption by the widow, Collusion of prior reversioners—Consent to adoption Estoppel—Adoption of an only son. Guruling swamy v. Ramalakshmamma

One who is not the nearest reversioner on the death of a Hindu widow is entitled to sue for a declaration that an adoption made by her is invalid where the nearer reversioners are in collusion with the widow, or have concurred in the adoption, or refused to institute proceedings to set it aside, or precluded themselves from suing.

Held further that the mere consent of the plaintiff reversioner cannot estop him from seeking a declaration that it is invalid.

Held also that under the Hindu Law and on the principle of *stare decisis* an adoption of an only son is not invalid.

Per Muthuswami Iyer J. Obiter. A Hindu widow may give an only son in adoption without special autherity from her husband *Narayanasami* v. *Kuppusami*, I. L. R, 11 M, 43 and 489 followed.

Appeal against the Decree of the District Court of Godavari in Original Suit No. 19 of 1892.

J. *G. Smith*, for appellant.

The Advocate-General (J. H. S. Branson) and *H. Raghavendra Row* for respondent.

Muthusami Aiyar, J.—There are two proprietary Estates called Kapilêswarapuram and Kêsanakuru in the District of Godavari. Their last male owner was one Buchi Sarvarayudu. He died without male issue leaving him surviving a widow named Rama-Lakshmamma. On the 10th November 1888 she adopted the 2nd defendant, Pattabhiramayya and this suit was brought to have it declared that his adoption is invalid and inoperative.

It is not alleged in the plaint that Buchi Sarvarayudu authorized Rama-Lakshmamma to adopt and it is the case of both parties that the adoption was made under the sanction or with the consent of his *sapindas or gnatis.* The plaint alleged that their consent was given under corrupt inducement. It is an undisputed fact that

* A. S. No. 17 of 1894. 20th September 1894.

the 2nd defendant was the only son of his father and he was given in adoption by his mother after the death of his father. On this point the plaintiff's case was that a Hindu widow in Southern India is incompetent to give as well as take a son in adoption without express authority from her husband. It was contended for the defence that no such authority was needed to validate the gift in adoption and that 2nd defendant's father had also given such authority prior to his death. The adoption was impeached by the plaintiff on three grounds :—

I. The sanction or the consent of Sapindas was not given *bona fide*.

II. The adopted was an only son, and

III. A widow was incompetent to give away her only son save under express authority from her husband.

The plaint admits that plaintiff is one of the *Sapindas* of Sarvarayudu who consented to or concurred in the adoption and the pedigree filed in the case shows that defendants 3, 5 and 7 whose names were struck out by the judge on the ground that they were not necessary parties to the suit are nearer in *sapinda* relationship than plaintiff.

Two preliminary objections were taken to the suit, *viz.*

I. That as a remote reversioner the plaintiff could not maintain the suit and

II. That by his concurrence in the adoption when it was made he was estopped from impeaching its validity.

These form the subject of the 1st and 2nd issues and the averments in regard to the invalidity of the adoption form the subject of the 3rd issue.

* * * * * * * * * *

Passing on to the 1st issue, there can be no doubt that it must be decided in appellant's favor. The general rule is no doubt that a suit of this nature should be brought by the presumptive reversionary heir, but it is a recognized exception to that rule that a more distant reversioner can maintain the suit, if he can show that those reversioners who are nearer to the deceased in the line of succession are either in collusion with the widow, or have precluded themselves from interfering, or refused without sufficient

cause to institute proceedings, or concurred in the act alleged to be wrongful. The law is enunciated to that effect by the Privy Council in *Rani Ananda Koer* v. *The Court of Wards,* L. R, 8 I. A, 22 and 23. There is proof in the case before us that defendants 3 and 5 who are nearer than plaintiff sanctioned or concurred in the adoption and 7th defendant who is also a reversioner withdrew the suit he had instituted to set aside this adoption. In passing, I may also observe that the judge is in error in striking out the names of nearer reversioners. They are legitimate parties to the suit and their Lordships of the Privy Council observe to that effect in the case cited above.

As regards the 2nd preliminary question, the decision must be in plaintiff's favor. No estoppel can arise from ignorance of law which both parties must be presumed to know. The adoption took place in 1888 whilst this suit was brought in 1892. There are not in this case equitable considerations consequent on the growth of a new family or rights of property under an invalid adoption concurred in for a considerable interval of time. It must also be remembered that according to true Hindu theory, adoption is both a religious and a secular act and estoppel cannot take the place of a religious act on which rests the conventional Hindu belief that a valid adoption generates filial relation and religious competency to make funeral and annual offerings with efficacy.

* * * * * * * * * *

Another contention with reference to the third issue is that a woman is not competent to give away an only son in adoption without express authority from her husband. The judge observes that in fact the 2nd defendant's mother who gave him in adoption had her husband's authority. There is the plaintiff's own admission to that effect in E 5 and 6 and there is also the evidence of the 2nd defendant's maternal uncle. Again, the question whether such authority is necessary to validate the gift in adoption in Southern India arose in *Narayanasami* v. *Kuppusami,* I. L. R, 9 M, 44. It was held in that case that a widow's power to *give* a son in adoption is co-extensive with that of her husband and that no special authority is needed from him. The *Smritis* and commentaries which bear on the subject are cited in that decision and it is shown that the conclusion arrived at by the author of Dattaka

Chandrika is, that in the absence of express prohibition from the husband, the widow has the same power to give that he has.

This brings under our consideration the substantial question in this suit, *viz.* whether an only son can be given in adoption.

There are several *Smritis* which forbid such adoption. They are cited in the leading case on the subject, *viz. Chinna Gounden* v. *Kumara Gounden,* I. M. H. C. R, 54. Several of them state the reason of the prohibition is the desire to prevent the extinction of the natural family or the failure of funeral offerings to the deceased members of that family. The texts are also referred to in *Narainasami* v. *Kuppusami* where the question arose but was not pressed on the court. In 1862, the question was first considered by the High Court in *Chinna Goundan* v. *Kumara Goundan.* It was decided in that case that if an only son were adopted, the adoption would be valid: the ground of decision being that the *Smritis* which forbid it were only directory and not imperative, and that though the adoption was a sinful act, it was not invalid if it took place. In that case, prior decisions reaching back to the early part of this century are relied on in support of the decision. The opinions of Sir Thomas Strange and Jagannâtha are mentioned. I may refer to the opinion of Viswanâth Nârâyana Mandlik on the subject. It appears further from I. L. R, 9 M, 44 that the decision in 1862, was followed in Regular Appeal No. 70 of 1882. In 1886, the appellant's pleader did not press the point that such adoption was invalid in view of the course of decisions in the presidency. No case is cited in which such adoption was held in Southern India to be illegal. In this state of the authorities, I do not think that the question is *res integra* and I am of opinion that the judge was right in following the course of decisions in this Presidency for the reason stated by him. The result is I would dismiss the appeal with costs.

Shephard, J.—This is an appeal against the decree of the District Judge dismissing the suit brought by the plaintiff for a declaration of the invalidity of the adoption of the defendant Pattabhiramayya by the defendant Râmalakshmamma, who is the childless widow of the last holder of certain estates in which the plaintiff claims a reversionary interest. Although the judgment against the plaintiff is professedly based on the judge's opinion

with regard to the question raised by the issue, he expressed an opinion adverse to the plaintiff on the first issue and arguments were addressed to us with regard to that issue as well as the second. The opinion expressed by the judge is that the plaintiff not being the nearest reversioner cannot maintain the suit without showing collusion on the part of the intermediate reversioners. If it is meant that refusal on the part of those persons to question the adoption is not sufficient to justify the plaintiff in suing, I think that the judge is wrong, for it is clear that under those circumstances and without proof of fraud a reversioner in the plaintiff's position may maintain a suit to protect his reversionary rights. The plaint makes the necessary allegations and there is evidence to support them.

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On the second issue raising the question of estoppel, I think it is sufficient to say that in my opinion no estoppel arises as against the plaintiff by reason of the mere fact that he concurred in an adoption which was supposed by all parties concerned to be legal and valid.

The substantial question in the appeal is whether the adoption of an only son is valid according to Hindu Law.

As long ago as 1862 this question was held by this Court to be concluded by authority— I M. H. C, 58. Since then the question has been raised again three times and received the same answer (I. L. R, 11 M, 489 and *ibid* 46). The authority referred to includes the opinion of Sir Thomas Strange and Colebrooke and decisions in 1801 and 1817. It is not shown that the current of authority is broken by any single decision in this Presidency to the contrary.

It is pointed out to us that some doubt seems to have been entertained by the learned judges who took part in the decision of 1884 The circumstance may perhaps be accounted for by the fact that the Chief Justice had previously when a member of the Allahabad Court expressed an opinion adverse to that entertained by this court. (See I. L. R, 2 A, 160). The fact remains that the current of authority is for this Presidency unbroken. The present question is by no means the only question of Hindu Law on which the High Courts have maintained different views. On questions

of this class it appears to me pre-eminently desirable not to disturb well settled rules of law. I would therefore decline to treat the question as an open one and would dismiss the appeal with costs. The point taken with regard to the Pleader's fee was dealt with at the hearing. I would decline to interfere with the judge's discretion.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins Kt., Chief Justice and Mr. Justice Parker.

Queen Empress.*
v.
Para Palayathan.

Queen Empress *v.* Para Palayathan.

Abkari Act (Madras) Act I of 1886, S. 43—Bail-bond—Enforcement of penalty—Criminal Procedure Code, S. 514—Discretion of Magistrate.

When, on default of appearance of a person bailed to appear before an Abkari Inspector, he is of opinion that the penalty mentioned in the bail bond should be enforced and forwards the bond under S. 43 of the Abkari Act to the Magistrate having jurisdiction to try the offence of which the person bailed was accused, the Magistrate is not to be regarded as a mere executing officer but has the same discretion which he would have, if a defaulter had failed to appear before his own court.

Case referred for the orders of the High Court, under S. 438 of the Criminal Procedure Code by the District Magistrate of Chingleput in his letter dated 23rd May 1894.

The facts of the case appear sufficiently from the following judgment of the High Court.

The Public Prosecutor (*E. B. Powell*) for the Crown.

The surety was not represented.

JUDGMENT:—Section 43, Madras Act I of 1886, provides that when by reason of default of appearance of a person bailed to appear before an Abkari Inspector such officer is of opinion that proceedings should be had to compel payment of the penalty mentioned in the bond, he shall forward the bond to the Magistrate having jurisdiction to try the offence of which the person bailed was accused, and the Magistrate shall proceed to compel payment of the penalty in the manner provided by the Criminal Procedure Code for the recovery of penalties in the like cases of default of appearance by a person bailed to appear before his own court.

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* Crl. Rev. Case No. 272 of 1894. 28th August 1894.

The procedure which the Magistrate has to follow is laid down in S. 514, Criminal Procedure Code. The question is whether the language of S. 43 of the Madras Abkari Act makes the Magistrate a mere executing officer and takes away from him the discretion which he would be at liberty to exercise if the defaulter had failed to appear before his own court. If the Magistrate is merely an executing officer, the provisions of S. 514, Criminal Procedure Code, enabling him to call upon the defaulter to show cause why the penalty should not be enforced, would become inapplicable; and the appeal to the District Magistrate given by S. 515, Criminal Procedure Code would also be taken away, since there can be no ground for appeal or revision if the inferior Magistrate could not exercise any discretion but was bound by law to pass one order only.

The legislature has not provided for any revision of the orders of the Abkari Inspector who is not bound even to call upon the defaulter to show why the penalty should not be enforced.

If, therefore, the Magistrate has no such power, the amounts fixed by the Station-House officer under S. 40, Cl. 2 of the Abkari Act, would become final, since no power is given to the Abkari Inspector to reduce the penalty.

We are of opinion that the legislature could not have intended such a result and that the intention was to make all the provisions of S. 514, Criminal Procedure Code, applicable to a Magistrate enforcing a penalty on the application of an Abkari Inspector under S. 43, Madras Act I of 1886. From the fact that the Inspector is directed to send the bond to the Magistrate *"having jurisdiction to try"* the offence of which the person bailed is accused, the intention of the legislature would appear to have been that the Magistrate should proceed in the same manner and with the same powers as if the default had been made by a person bailed to appear before his own court. This inference is strengthened by the fact that where the legislature intended as in S. 516, Criminal Procedure Code, that the Magistrate should have no discretion but should merely execute the orders of superior authority, the direction to levy the amount may be addressed to *"any"* Magistrate. Nor can we suppose that the legislature intended to make the orders of the Station-House officers and the Abkari Inspectors final and to take away by implication the liberty to appeal under S. 515, Criminal Procedure Code.

For these reasons, we are of opinion that the view taken by the Second Class Magistrate as to his legal powers was correct.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Shephard and M. Justice Davies.

Gopal Reddi ... ... { Appellant and Respondent* in S. A. Nos. 390 and 1670 of 1893, respectively (*Plaintiff.*)

v.

Chinna Reddi, Arunachella Pillai. .. ... { Respondents and Appellants in S. A. Nos. 390 and 1670 of 189 respectively (1st and 3rd *Defendants*).

Gopal Reddi *v.* Chinna Reddi.

Self-defence—Upper riparian proprietor—Extraordinary Casualty—Lower riparian proprietor.

An upper riparian proprietor in order to prevent damage to his lands by periodical floods and to keep the water to the proper channel raised the bund along the bank of the stream and fortified it with stone, and in consequence the lands of a lower riparian proprietor were inundated. It was found as a fact that previous to the raising of the bund, the stream did not flow in a definite channel through the upper proprietor's lands, but merely spread itself over and inundated them.

Held that if it was not reasonably practicable for the upper proprietor to defend his lands from inundation by other means which would have prevented damage to the lower proprietor, the upper proprietor would not be guilty of any actionable wrong, *Shephard, J.*, doubting whether any wrong would be committed, even if such other means of preventing damage to his own lands were open to the upper proprietor.

Second appeal against the decree of the District Court of North Arcot in appeal suit No. 172 of 1890, modifying the decree of the court of the District Munsif of Vellore in Original Suit No. 151 of 1889.

The facts of the case appear sufficiently from the following order of the High Court.

R. Sadagopachariar vakil for the appellant.

T. V. Seshagiri Aiyar vakil for the respondents.

Order :—*Shephard, J.*,—The plaintiff and the defendants are riparian proprietors, the former occupying lands lower down the stream than those occupied by the defendants. The stream is a

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S. A. Nos. 390 and 1670 of 93, 7th March 18894.

jungle stream, not used for irrigation purposes and apt at times to rise suddenly and flood the lands through which it flows. In order to protect their lands against flooding and to keep the water to its proper channel the defendants raised the bund along the bank of the stream and fortified it with stone. This is the act complained of by the plaintiff as wrongful, it being charged that the plaintiff's lands were in consequence inundated and sustained damage. The complaint is that the bunds have been raised above the height at which they stood before, for it is found or admitted that it has been long the practice to have some sort of bunds. It is not suggested that the act complained of was done otherwise than with the object of protecting the defendants' lands. On the contrary the District Judge finds as I understand, that in the absence of a bund the defendants' lands will become uncultivable; and it is for that reason, coupled with the fact that the plaintiff can by also raising a bund and clearing out the channel protect his own lands, that the District judge refused the injunction which the District Munsif has granted.

The question is whether, under these circumstances, any actionable wrong has been committed by the defendants.

The only case cited in argument was *Neild* v. *London and Northwestern Railway Company*, L. R., 10 Ex., 4. In that case the facts of which are certainly distinguishable from the present, Bramwell, B., observes that in the case of a natural watercourse, it may be that the riparian owner is entitled to protect himself against extraordinary floods by keeping off extraordinary water."

In a later case *Whatby* v. *Lancashire* and *Yorkshire Railway Company*, L. R., 13 Q. B. D., 131, *Brett M. R.*, citing the above case and *R.* v. *Pagham Commissioners*, 8 B & C., 355, says "There are two cases which have been decided; an extraordinary danger threatens you; you have a right to defend yourself again st it, before it has occurred to you. To protect yourself, and only for the purpose of protecting yourself, you prevent the dangers from happening to you, but the danger is so far common that the necessary consequence of its being prevented from happening to you is that it will happen to your neighbour. In so acting in defence of yourself or of your property, you have done nothing by any act intended to injure your neighbour and you are not answerable,

because the danger which has been diverted from you has done mischief to somebody else."

The extraordinary danger in *R.* v. *Pagham* was the inroad of the sea brought about, one may presume, by peculiar conditions of tide, wind, and the like. I fail to understand why the periodical rising of a stream, consequent on the fall of rain, should any the less be considered an extraordinary danger. The case seems to me precisely that stated in the Digest XXXIX.

There is a great distinction between protecting oneself from an apprehended danger and getting rid of the consequences of an injury which has actually occurred. The distinction was clearly marked in *Whatby's* case where it was held that the defendants were liable because, a misfortune having happened, they had transferred it from their own lands to that of the plaintiff.

It is quite another matter to hold that landowners are not at liberty to improve their land by keeping a stream within bounds. Where an act of mere prevention is complained of, I think it must be shown that the defendant has in fact diverted the stream from its natural course. Here, as I understand the facts, the stream when in flood, took no definite course but simply spread itself over the defendants' lands and so did not come in its full volume to the plaintiff's lands. What the defendants have endeavoured to do is to confine the flood water to the ordinary channel, and it is open to the plaintiff to adopt the same measures of defence. Instead of so doing, the plaintiff in effect demands that the defendants' lands shall for ever continue to remain subject to periodical inundation and therefore less fit for cultivation than they might otherwise be. At present it is true that the plaintiff has only succeeded in getting damages, but if the judgment is right and the defendants, notwithstanding it, persist in maintaining their bunds, there can be no reason why the demand for an injunction should not on some other occasion be granted.

In the view which I take of the facts as found, the plaintiff has not succeeded in proving any actionable wrong to have been committed by the defendants, but if Davies, J., thinks otherwise, I have no objection to asking the Judge to find " whether the stream when flood was previously to the raising of the bunds complained of, used

to take its course as such over the defendants' lands, or to spread itself over and inundate the said lands."

Davies, J.,—I think the Judge's finding on the alternative question last put by *Mr. Justice Shephard* is clear, namely, that the flood water spread itself over and inundated the defendants' lands, not that they diverted the natural course of the stream. I would not propose to send that issue down.

The issue that I would propose is "could the defendants have protected their property by any other means than those they adopted by which other means no damage would have been done to the plaintiffs' land." In the case of a sudden and extraordinary casualty" such as the flood in *Nield* v. *London and Northwestern Railway Company*, the principle "seems to me one of *sauve qui peut*." In cases where the casualty is of common recurrence and expected, as in this case it is found to have been, I think defendants, if it was reasonably possible, should have adopted protection works that would not have hurt their neighbour. If no other measures than they did adopt were reasonably practicable, then they were justified on the ground that the damage caused was inevitable. Hence the issue I propose.

Shephard, J., again:—As I read the judgment of the District Judge, the only way in which the defendants could protect their lands was by raising the bund and it seems obvious that the other mode which may be suggested, viz., that of clearing out the channel, cannot therefore serve as more than a temporary expedient. However as there may be doubt, I have no objection to the suggested issue, only I must add this, that I am not convinced that the defendants would be liable, even if some other equally efficacious expedient might have been adopted by them without any evil con-consequences to the plaintiff. The exact issue should be "whether it was reasonably practicable for the defendants to defend their lands from inundation by any means other than those adopted which would not have caused damage to the plaintiff."

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthuswami Aiyar and Mr. Justice Best.

R. G. Orr and 2 others ... .. Appellants (*Plaintiffs*).*

v.

Raman Chetty and 3 others . . Respondents (*Defendants*).

R. G. Orr *v.* Raman Chetty

Customary right—Easement—Diversion by Upper proprietor—unreasonableness of custom—Natural stream—Riparian rights—Extraordinary user.

A natural stream in the Sivagunga Zemindari fed a number of tanks through supply channels one of which supplied the defendants,' villages and another, a village lower down the stream. The plaintiff, the lessees of the Zemindari sued for the removal of a dam put up by the defendants across the stream to divert their water into their supply channel diminishing thereby the water available for the tank T. *Held* (1) that in the absence of an easement or customary right to the contrary, the defendants would not have the right to put up the dam so as to diminish the supply available to the plaintiffs *Swindon Water Works Co.*, v. *Wilts and Berks Canal Navigation Co.*, L. R, 7 H. L., 697 followed; (2) that such a right of the nature of an easement could be acquired by custom and the defendants in the case had so acquired it; (3) that such a custom cannot be deemed to be unreasonable and (4) that the defendants as lessees of one of the villages of the Zemindary were not incapable of acquiring such rights as against the plaintiffs as the subsequent lessees of the Zemindari.

Per cur. A natural stream is one which has a natural source and flows in a natural channel.

Second Appeal against the decree of the Subordinate Judge's Court of Madura (West) in Appeal Suit No. 337 of 1891 reversing the decree of the Court of the District Munsif of Sivaganga in Original Suit No. 15 of 1890.

The facts of the case appear sufficiently from the following order of the High Court.

Kenworthy Brown, and *C. R. Thiruvenkatachariar* for *V. Bashyam Aiyangar,* for the appellants.

S. Subramaniem for the respondents.

ORDER:—Appellants are the lessees of the zemindary of Sivaganga in the District of Madura and Respondents are the prior lessees of a village in that zemindary called Surakudi. There is a river called Palar which rises in the Karandamalai hills in the

* S. A. No. 1471 of 1892. 4th May 1894.

District and runs first through a number of Government villages and feeds the tanks situated therein. It then enters the zemindary and, after feeding a number of tanks through supply channels, empties itself into the tank of the Tirupatore village.

Appellants represent the villages which depend for their irrigation on the Tirupatore tank and Respondents represent the Surakudi village. In November 1888, Respondents put up a sand dam across the river, 94 yards in length, one yard in width, and ¾ yard in height at the spot E in the plan, and thereby directed all the water flowing down the river Palar into their supply channel C diminishing thereby the quantity which would otherwise be available for the Tirupatore tank. Hence this litigation.

The Appellants' case is that Respondents have no right to put up a sand dam across the river, that they are entitled to take into their channel C only so much water as naturally flows into it from the river, and that there is a masonry calingula at the head of the channel C to regulate the supply from the river. Appellants prayed in their plaint that respondents might be directed to remove the sand dam at their own cost, and further to pay to plaintiffs Rs. 1,143 with interest thereon as compensation for the loss sustained by them in Fasli 1298 and subsequent mesne profits.

For Respondents it is contended (1) that they have a right to put up the sand dam in question and that such right is their natural right. They urge further (2) that it is customary for owners of channels supplied by the river Palar and other rivers in the district to put up dams whenever the rivers run low and to direct their waters into their channels, (3) that otherwise, no water will flow into those channels (4) that they used to put up such dams across the river Palar for more than 20 years and divert the water into their channel; (5) that the dimensions of the dam are not correctly stated in the plaint and (6) that appellants have sustained no damage as alleged.

Six issues were tried in this case, the first three as to the right to put up the dam at E in the plan and to divert the river water into the channel C, the 4th relating to the dimensions of the dam and the 5th and 6th referring to the damages alleged to have been sustained by appellants.

The District Munsif considered that as lower riparian owners, Appellants had the natural right to the flow of the stream from the Palar into the Tirupatore tank without diminution and that Respondents had no right by custom or prescription to throw a dam at E and divert the water into the channel C when the river was low. He found that the damages sustained by Appellants amounted to Rs. 150 and accordingly decreed payment of that amount by Respondents. He also directed Respondents to remove the dam.

Respondents appealed from this decision. On appeal the subordinate Judge came to the conclusion that by custom and user as of right for more than 20 years, respondents had acquired a right to put up a dam of the kind mentioned in the plaint, and reversing the decree of the District Munsif, dismissed Appellants' suit with costs.

From this decree Appellants (Plaintiffs) have preferred this second appeal.

The first objection taken to the decree of the Lower Appellate court is that the subordinate judge has virtually resettled the issues and has omitted to come to a finding on the first issue. That issue raises the question whether the river Palar empties itself into the Tirupatore tank and whether plaintiffs have a right to the uninterrupted flow of the water of the said river into their tank. Referring to the undisputed fact that the river falls into the Tirupatore tank and flows over lands in Tirupatore and to the rule of law as to the natural right of a lower riparian owner, the District Munsif determined the issue in the affirmative. In noting the points for determination on appeal in paragraph 5 of his judgment, the subordinate judge did not allude to the natural right of riparian owners. He evidently presumed that the river is a natural stream and that the decision must depend mainly on the customary and prescriptive right set up by Respondents. There is sufficient ground for the presumption. The plaint does not describe the stream as being an artificial watercourse. A natural stream is one which has a natural source and flows in a natural channel; such is the case of the Palar. It has its source in a hill and flows down in a defined natural channel, till it falls into the Tirupatore tank. There is no suggestion in the plaint that any person had anything to do either with the creation of the supply of water at its source or with its

flow in a defined channel; on the other hand, there is an admission in the plaint that respondents are entitled to so much of the river water as may naturally flow into their supply channel C. In *Miner* v. *Gilmore*, 12 Moo, P. C., 11, *Lord Kingsdown* has explained the law on this point in these terms:—"By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the right of other proprietors either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation, but he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury." As to what is a reasonable though extraordinary use, *Lord Cairns* propounded the law on the subject in *Swindon water works Company.*, v. *Wilts and Berks Canal Navigation Company*, L. R. 7, H. L.. 697:—"Undoubtedly the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water; that is quite consistent with the right of the upper owner to use the water for all ordinary purposes, *viz.*, as has been said *ad lavandum et ad potandum*, whatever portion of the water may thereby be exhausted and may cease to come down by reason of that use. But, further, there are other uses no doubt which the upper owner is entitled to, *viz.*, uses connected with the tenement of the upper owner, under certain circumstances and provided no material injury is done, the water may be used and diverted for a time by the upper owner for the purpose of irrigation. * * * Whether such a use is a reasonable use, would depend, at all events, in some degree, on the magnitude of the stream from which the deduction was made for the purpose over and above the ordinary use of the water."

We see no reason to think that the Subordinate Judge intended not to adopt the finding of the District Munsif on the first issue. The substantial question therefore is that raised by the 2nd and

3rd issues, *viz.*, whether the customary right and the easement set up by Respondents are established.

As regards the 2nd issue, the subordinate Judge explains it as raising for determination two subsidiary questions, *viz.*, (1) whether there has been a usage of throwing a temporary sand dam across the river Palar, so as to divert the river water into the channel C, as alleged by Respondents and (2) whether there has been a similar usage with reference to other channels above and below the channel irrigating Surakudi.

We see no reason to think that, as argued on Appellants' behalf, the framing of the issue is substantially defective. It sufficiently directs the attention of the parties to the question of usage as the foundation of a right of easement controlling the natural right of a lower riparian owner.

We are of opinion that due regard was had to the distinction between custom as the source of an easement and an easement as a distinct right in itself. An easement is a right existing in a particular individual in respect of his land, whilst custom is a usage attached to a locality. Though a customary right belongs to no individual in particular, yet it is capable of being enjoyed by all those who for the time being own land in the locality to which the right attaches. The distinction is explained in *Momisey* v. *Ismay*, 3 H. & C., 486 and the rule of law is that "if a custom is shown to exist under which individuals of a class may obtain independent rights in respect of their land which would be easements if acquired by grant or prescription, those rights are nevertheless easements though acquired by reason of the custom."

On the question of custom or usage, the District Munsif found that it was not proved; but the Subordinate Judge, after discussing the evidence both oral and documentary relied on by both sides, comes to the conclusion that it is well established. His finding is that the usage is found to have existed in Respondents' Village from before 1838 and that a similar usage has been proved to prevail in regard to 30 channels having dams accross the Palar river, permanent or temporary, for irrigating lands in some 30 villages. This is a finding of fact which we must accept in Second Appeal. Several objections are urged against the finding on Appellants' behalf and we proceed to consider them.

The first objection is that the lands in Surakudi do not abut on the river Palar and are not therefore riparian lands. The Subordinate Judge does not rest his decision on the natural rights which Respondents, as riparian owners, possess, but on the right of easement founded on custom and user for more than 20 years.

The 2nd objection is that the custom found by the Subordinate Judge is unreasonable, since the right claimed is a right to obstruct the whole stream. It is not unusual in this country for each of those who own lands adjacent to streams depending upon them for irrigation to take water by turns either for a certain number of days or hours. The Subordinate Judge observes that the evidence shows that when the dam is put up, water oozes through it and flows down the stream beyond the dam to the height of half a yard and that the user is reasonable with reference to the evidence in this case. Even assuming that such user is not an incident of the natural right of a riparian owner, it cannot be treated as unreasonable as an incident of the right of easement based on custom and long user. It is quite possible that the villages depending for irrigation on the river Palar came under cultivation in times past subject to the custom.

The remark of the Subordinate Judge that there are two calingulas across the river so as to obstruct the whole stream when it is low is not without significance.

The third objection taken for the Appellants is that the custom is indefinite and that the Subordinate Judge has recorded no finding as to the dimensions of the dam. But he observes that Appellants denied Respondents' right to put up a dam at all and did not take any objection to the dimensions of the dam mentioned in the plaint and considers that no finding is necessary. It appears, however, that the 4th issue was recorded and the question was thereby distinctly raised. The Subordinate Judge must be requested to submit a finding on the 4th issue.

Another objection is that as tenants of the Zemindar, Respondents are not entitled to set up a right of easement by custom. The Subordinate Judge has dealt with this objection in paragraph 12 of his judgment and we consider that he has properly disallowed it.

There is nothing in the Easements Act to invalidate customary easements and we are of opinion that the decision of the Subordinate Judge is right except as regards the 4th issue.

Before finally disposing of this second appeal we shall call upon him to submit a finding on the 4th issue upon the evidence on record * * * *

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

V. S. S. K. Narayana Aiyar .. ... Appellant (*Plaintiff*).*

v.

Simha Astanasi and others ... ... Respondents (*Defendants*).

Narayana Aiyar v. Astanasi.

Specific Relief Act—S. 42 Declaratory suit—Collusive decree.

4th defendant who obtained a decree against defendants 1 to 3 in the subordinate court of British Cochin got the same transferred to a court in Native Cochin for execution and attached certain lands there belonging to 4th defendant Plaintiff was the holder of a decree against 4th defendant in the Native Cochin court. According to Cochin law, the person who first attaches a judgment-debtor's property is entitled to priority over any other decree-holder, but the latter on showing that the decree of the person attaching was collusively or fraudulently obtained would be entitled to an order granting priority to himself, but when the decree impeached is not passed by the court before which the objection is taken he must obtain the order for priority from the court that passed the decree attached. Plaintiff consequently sued in the subordinate court of British Cochin for a declaration that the 4th defendant's decree was collusively obtained, in order to move the Cochin court, to give his own decree priority over the 4th defendant's Held that plaintiff was entitled to the declaration and that he could not ask for any consequential relief.

Appeal-against the decree of the Subordinate Judge of Cochin in Original Suit No. 39 of 1892.

Plaintiff instituted the suit for a declaration that the decree passed by the sub-Court of British Cochin in favour of the 4th defendant against the defendants 1 to 3 was fraudulently and collusively obtained and the object of the declaration was to

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* S. A. No. 39 of 1894. 17th September 1894.

obtain in the *Anji Kammal Zillah Court* in the Cochin state an order entitling plaintiff to realize out of certain properties attached by the 4th defendant the plaintiff's debt in preference to the 4th defendant's debt. The 4th defendant had got his decree transferred for execution to the *Anji Kammal* Court and attached the properties with reference to which the plaintiff wished priority. According to the law of Native Cochin, the decree-holder who first attaches any property in execution is entitled to have his debts discharged out of the attached property in preference to other decree-holders who might subsequently attach the same property. But if the first attaching creditor's decree is proved to have been collusively or fraudulently obtained, his priority will be lost and the person who next attached would have priority. The person who subsequently attached may obtain an order giving him priority where the first attaching creditors' decree was fraudulently obtained, if the latter was passed by the executing court. If it was passed by another court such an order has to be obtained from the court that passed it. The decree in the present case having been passed by the court of British Cochin, the plaintiff instituted the suit for the declaration. The defendant contended *inter alia,* that the suit for a mere declaration was not maintainable as the plaintiff was entitled to get the 4th defendant's decree cancelled. The Subordinate Judge upheld this contention and dismissed the suit. The plaintiff appealed to the High Court.

P. R. Sundara Aiyar for appellant.

K. P. Sankara Menon for respondents.

JUDGMENT:—We are clearly of opinion that the subordinate Judge was in error in holding that it was necessary for plaintiff to ask for consequential relief by cancelling the decree in original suit No. 19 of 1892.

It is not necessary for plaintiff who is not bound by that decree to seek to set it aside. His only interest is in showing that the attachment obtained under that decree in the Cochin Court has no priority over the attachment before judgment which he obtained in his own suit against the same defendants—See *Pachamuthu* v. *Chinnappan,* I. L. R., 10 M, 213 and *Unni* v. *Kunchi Amma,* I. L. R., 14 M, 26.

All that is necessary for plaintiff to obtain is a declaratory decree showing that the decree obtained by 4th defendant against defendants 1 to 3 is collusive and will not affect the attachment he has made.

If he obtains that decree, it is for him to produce it in the *Anji Kammal Zillah Court* on his application for execution and claim priority over the attachment made by 4th defendant. No consequential relief can be asked for in the form of an order addressed to a foreign court or an injunction to 4th defendant not to execute a decree in foreign territory. Should plaintiff show the native Cochin court that 4th defendant's decree was obtained by fraud, that court would doubtless refuse to give 4th defendant priority—See *Haji Musa Haji Ahmed* v. *Purmanand Nursey* I. L. R., 15 B, 216. The decree of the Subordinate Judge's Court must be reversed and the suit remanded to be heard on the merits.

Appellant is entitled to the costs of this appeal and the costs in the court below will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Muthusami Aiyar and Mr. Justice Shephard.

Duddu Gopaludu ... ... Appellant *(Plff)*.*

v.

Gudata Venkataratnam .. .. Respondent *(Deft)*.

Gopaludu v. Venkataratnam.

Contract Act IX of 1872, S. 74—Enhanced interest from date of bond on default—Reasonable compensation—Interest *post diem.*

Where a mortgage-bond stipulated for payment of the principal with interest at 21 p. c per annum on a certain date and on default of payment on such date provided that interest shall be paid at 36 p. c. per annum from the date of the bond, held (1) that the document must be construed as providing for interest beyond the due date also and up to the date of payment and (2) that a stipulation for payment of interest at an enhanced rate on default from the date of the bond is penal and reasonable compensation only can be awarded.

Per. Muthusami Iyer J :—Even though the enhanced rate payable on default runs from the date of the bond, it may be awarded in some cases as reasonable compensation.

Second appeal against the decree of the District Court of Godavari in Original Suit No. 83 of 1893 modifying the decree of the Court of the District Munsiff of Amalapur in Original Suit No. 311 of 1892.

P. R. Sundara Iyer for appellant.

M. E. Srirangachariar for *M. O. Parthasarathi Iyengar,* for respondents.

The following judgments were delivered by the court :—

Muthusami Aiyar, J. :—This was a suit on a hypothecation bond, dated the 19th April 1882. As regards the principal amount Rupees 200 both the Courts below decreed the claim. As regards interest, the bond provides that the principal shall be paid back, in two instalments with interest at 21 per cent per annum, Rupees 100 with interest on the 8th May 1883 and the remainder with interest on the 27th April 1884. The bond then proceeds to stipulate that if each instalment is not paid on the due date, then interest shall be paid at 36 per cent per annum from the date of the bond.

* S. A. No. 736, of 1894. 18th September 1894.

The plaint stated that there was default in paying both instalments and claimed Rupees 699-1-0 as interest due at the enhanced rate from the date of default.

Relying on the case reported at I. L. R, 12 M, 161, the District Munsiff decreed the interest claimed. But on appeal, the judge was of opinion that there was no provision in the bond for interest from the due date to date of payment and that the agreement to pay enhanced interest extended only to the due date. Upon this construction of the document, the judge decreed interest at the enhanced rate as provided in the bond up to due date, refused interest from the due date to that of the plaint and awarded interest at 6 per cent per annum from date of plaint to date of realization. To this decision the Plaintiff (Appellant) objects on three grounds *viz.*, (I) that the judge has misconstrued the document (II) that he ought not to have refused interest from date of default to date of payment and (III) that the interest as provided in the bond is payable till date of payment.

I am of opinion that the judge is in error in holding that the bond contains no provision for payment of interest after the due date. The words from the date of the bond are used in contradistinction to the words, from the date of default which is premised, and they are not designed to limit the time up to which interest is payable. The natural construction is that in case there is no default, interest shall be paid at 21 per cent per annum and that in case there is default, interest shall be paid at 36 per cent per annum and that the payment at such higher rate shall be not only prospective from date of default but shall also be retrospective from the date of the bond. This being so, the next question is whether the agreement to pay interest at 36 per cent. in case of default is in the nature of a penalty and as such governed by S. 74 of the Contract Act. That section pre-supposes a case in which a contract is broken and a sum is named as the amount to be paid on such breach, the party complaining of the breach is entitled to receive reasonable compensation not exceeding the amount so named. The general rule is that effect is to be given to the intention of the parties as expressed by the contract in the absence of any rule of law to the contrary. When the contract is to pay a higher rate of interest from the date of breach its operation is

prospective, and the proper construction is that the debtor who commits default intends to pay the alternative rate and to return the money lent. On this point all the High Courts are agreed. When the agreement is to pay the higher rate on default from the date of the contract, the question arises whether it falls under S. 74, and as to this there is a conflict of opinion. The Full Benches of the High Courts at Calcutta and Bombay have held that S. 74 is applicable and that the agreement is penal and ought to be relieved against *Kalachand Kyal* v. *Shib Chunder Roy,* I. L. R, 19 C, 392 and *Umar Khan, Muhamad Khan, Deshmukh* v. *Sale Khan,* I. L. R, 17 B, 106. But the Full Bench of the High Court at Allahabad has held that S. 74 does not apply to agreements to pay alternative rates of interest. In *Nunjappa v. Nunjappa* I. L. R, 12 M, 161 a Divisional Bench of the High Court at Madras held that such agreement falls under S. 74 and that though no sum is named in Rupees, the *extra* sum payable is fixed and ascertainable beforehand or, at any rate, at the time when the default is made. In *Basavayya* v. *Subbarazu* I. L. R, 11 M. 294, another Divisional Bench held that when a mortgage bond provided for repayment of the debt in four instalments with interest at 6 per cent. and in default of payment on the due date provided for interest at 12 per cent from the date of the bond it was held that the stipulation being reasonable, the higher rate of interest was payable from date of the bond. This may be reconciled with *Nanjappa* v. *Nanjappa,* I. L. R, 12 M, 161 by the fact that the alternative rate provided by the contract was one which might be adopted as the measure of reasonable compensation. In *Narayana* v. *Narayana Rao* I. L. R, 17 M, 65 in which I took part, I followed *Basavayya* v. *Subbarazu,* I. L. R, 11 M, 294. In the present case, the contract was to pay interest at 36 per cent. from the date of the bond and it is therefore governed by S. 74, according to *Nanjappa* v. *Nanjappa,* I. L. R, 12 M, 161 and the High Courts at Calcutta and Bombay. I would therefore award interest at 21 per cent. per annum from date of bond to due date, 12 per cent. from these dates to date of plaint and 6 per cent. to date of realization. Costs will be assessed proportinately.

Shephard J:—The question is to what sum the plaintiff is entitled on account of interest payable in respect of the sum of

Rupees 260 due under the bond executed by the defendant. The District Judge has held that there is no stipulation in the bond for payment of interest after the dates when the two instalments become due. The words used are "If the amount of each instalment be not paid on the date of such instalment we shall make payment with interest at three Rupees per mensem per hundred Rupees from the date of the bond. "There is a *terminus a quo* given but no express *terminus ad quem* and the judge has accordingly held that the interest was to run only up to the dates fixed for the payment of the instalments.

In this construction it appears to me that the judge is wrong. The provision for enhanced interest pre-supposes a case of default. The date at which the instalment with interest at 21 per cent. is payable having passed, it is reasonable to suppose that it was intended that the substituted interest should run until the date of payment, and there are certainly no words indicating the contrary intention.

The question then is whether the provision for enhanced interest is of such a character as to make S. 74 of the Contract Act applicable.

According to the view expressed in *Nanjappa* v. *Nanjappa* I. L. R, 12 M. 161 and adopted elsewhere a stipulation for retrospective enhancement of interest is generally a penalty which has to be dealt with by the Court under the provisions of S. 74. The Court has to give a reasonable compensation not exceeding the amount named. In addition to the interest at 21 per cent. on the two instalments up to the dates when they respectively fell due, I would allow interest from those dates at the rate of twelve per cent. up to the date of the institution of the suit and subsequent interest at six per cent.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Shephard.

Sundara Boyi Ammal ... ... Appellant (*Plaintiff*).*

v.

Sama Rayer *alias* Rama Rayer ... Respondent (*Defendant*).

* S A. No. 538 of 1894. 19th September 1894.

Interest *post diem*—Charge on mortgaged property—Implied contract—Limitation. Sundara Bo v. Sama Raye

Where a mortgage-bond makes no provision for interest *post diem*, but interest as such is paid by the mortgagor for a period subsequent to the due date, an implied contract to pay interest *post diem* may be inferred from such payment, and the interest payable under such implied contract may be recovered by sale of the mortgaged property, even though the bond fell due more than 6 years before the date of the suit.

Second appeal against the decree of the District Court of South Arcot in Appeal Suit No. 166 of 1893, modifying the decree of the Court of the District Munsif of Villupuram in Original Suit No. 53 of 1893.

R. Runga Row for appellant.

H. Raghavendra Row for respondent.

Runga Row :—Interest has been paid after due date. Such payment is evidence of an implied contract to pay interest *post diem*. Even in the absence of an implied contract, interest is awardable under Act XXXII of 1839. The transfer of Property Act makes such interest recoverable by sale of property; see Ss. 86 and 88. Art 132 of the Limitation Act therefore applies, not Art 116. See I, L. R, 21 C, 276. [He also referred to a note in 1 Madras Law Journal, p. 252 on "Interest *post diem*:"—]

Raghavendra Rao relied on *BadiBibi Sahibal* v. *Sami Pillay* 2 M. L. J. R, 235 and the cases therein cited.

The court delivered the following Judgments.

Muthusami Aiyar J :—This was a suit on a hypothecation bond for Rs. 200, dated the 14th September 1883. It provided for repayment with interest at 12 per cent per annum on or before the 30th June 1885, but contained no express provision for interest after the due date. Two payments were made on account of the bond, Rs. 48 on the 5th June 1885 and Rs. 48 on the 9th September 1887. The first payment is endorsed on the bond as made for interest due for two years up to the 5th January 1885 and the 2nd payment is endorsed as made on account of interest due from September 1885 to September 1887.

The plaintiff claimed interest up to date of suit. The defence was that there was no provision in the hypothecation bond for

post diem interest, that it should not be charged on the property under hypothecation and that the payments should be credited to interest due up to due date and the balance to the principal. The District Munsif decreed *post diem* interest on the ground that the payments evidenced an intention or implied contract to pay interest after the due date. On appeal, the Judge held that *post diem* interest could only be allowed as damages for breach of contract and that as more than 6 years had elapsed after the due date, it could not be allowed even as damages. He refused to credit Defendant with Rupees 48, as it was a payment made for *post diem* interest when such interest was allowed by the Courts.

Hence this Second Appeal.

It is urged that there is evidence of an intention to pay interest after the due date. Payments endorsed on the hypothecation bond disclose such intention and show that interest was actually paid up to September 1887, whilst the due date was the 30th June 1885, The District Munsif was right in inferring from this a contract to pay interest after the due date and the question whether *post diem* interest awardable under Act XXXII of 1839 is to be treated as contractual interest awardable by the courts or as damages for breach of contract does not arise. It can only arise in the absence of a contract in regard to *post diem* interest express or implied. On this ground, I would reverse the decree of the District Judge and restore that of the District Munsif. Respondent will pay Appellant's costs both in this and the Lower Appellate Court.

Shephard J:—By the hypothecation instrument of September 1883, the defendant's predecessor in title convenanted to pay the principal together with interest at 1 per cent per mensem within the 30th June 1885. It is admitted that two sums were paid by way of interest in 1885 and September 1887. The suit was brought in February 1893. The District Judge has given the plaintiff a decree for the principal sum only, disallowing the claim for interest subsequent to the 30th June 1885 on the ground that such interest cannot be allowed except as damages and that a claim for such damages is barred by limitation. In the appeal before us against this decree it was argued that the plaintiff was independently of contract, entitled under the statute to interest *post diem* and that the money so payable was assimilated to interest and as such

chargeable on the hypothecated property so as to bring the case within the operation of Article 132 of the second schedule to the Limitation Act. A recent case *Bikramjit Tewari* v *Durga Dyal Tewari,* (I. L. R, 21 C, 276) was cited in support of this contention. In the present case, however, it is not necessary to consider the question whether a secured creditor claiming interest under the statute is entitled to add such interest to the security. Here there is no occasion for the creditor to have recourse to the statute, for there is evidence of an implied contract to pay interest after the date fixed for payment of the principal. The District Munsif finds that there was such a contract and I think he was right. The District Judge seems to think that owing to some change in the law there must be an express stipulation for interest and that otherwise interst can only be allowed under the Act. The judge has fallen into an error for there has been no change of the law and here as in England in the absence of an express stipulation a contractual obligation to pay interest may be established by proof of circumstances showing the intention of the parties that interest *post diem* shall be paid (see *Price* v. *Great Western Railway Company,* 22 L. J, Ex. p. 232). The decree of the District Judge should be reversed and that of the District Munsif restored.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Muthusami Aiyar.

Venganna Aiyar and 10 others ... Appellants (*Defendants*).*

v.

Ramasami Aiyar ... ... Respondent (*Plaintiff*).

Venganna Aiyer *v.* Ramasami Aiyar.

Civil Procedure Code, Ss. 562, 584, and 588 clause 28—Appeal against remand order—Powers of High Court—Finding of fact.

Where a court of first instance records evidence on all the issues, and at the final hearing dismisses the suit erroneously on some particular point without deciding the other issues, it is competent to the Appellate Court upon a reversal of the decision of the court of First Instance to remand the case under S. 562. *Ramachandra Joshi* v. *Hazi Kassim,* I. L. R, 16 M, 207 followed.

In an appeal against an order of remand, the High Court has no power to disturb the order, if it is a decision on a question of fact.

Civil Miscellaneous Appeal against the order of the District Court of Madura in Appeal suit 237 of 1891 reversing the decree

* C. M. A. 96 of 1893. 8th November 1894.

of the subcourt of Madura (East) in Original Suit 4 of 1890 and remanding the same.

The plaintiff sued to recover certain properties as reversioner of one *Seetharam Aiyar*. The defence was that the plaintiff was not the reversionary heir, that some of the properties did not belong to *Sitaramaiyen* and that other properties were held by them under valid alienations by *Sitaramaiyen's* widow. The sub-judge took evidence on all the issues, but holding that the plaintiff was no heir did not decide the other issues. On appeal the District Judge reversed the decision of the sub-judge as to the plaintiff's status and remanded the suit for a decision on the other issues. The defendants appealed against this order.

C. Ramachandra Row Sahib and *V. Rungachariar* for the appellant.

V. C. Desikachariar for the respondent.

ORDER :—The first issue recorded for decision in this case was whether the plaintiff was the next reversionary heir of Sitaramaiyen deceased. The court of first instance determined the question against the plaintiff, and dismissed the suit without deciding the other issues. On appeal, the District Judge found upon the evidence that the plaintiff was Sitaramaiyen's reversionary heir and reversing the decree of the first court, remanded the case under S. 562 of the Code of Civil Procedure for disposal on the other issues. Hence this appeal from the order of remand under clause 28 of S. 588 Civil Procedure Code. It is conceded that the order of remand satisfies the requirements of S. 562 both in form and substance. It was held in *Ramachandra Joshi* v. *Haji Kassim,* I. L. R, 16 M, 207 that it was competent to the lower appellate court to pass an order of remand under S. 562 when the Court of first instance records evidence on all the issues, and at the final hearing dismisses the suit erroneously on some particular point without expressing on the other issues. It is contended however that the judge's finding as to the plaintiff being the reversioner is contrary to the weight of evidence on the record and that this court is bound to consider whether the lower appellate court's finding is correct. The following cases were cited at the hearing, *Badam* v. *Imrit,* I. L. R, 3 A, 675; *Bhau Bala* v. *Bapaji Bapuji,* I. L. R, 14

B, 14; *Abrahim Khan* v. *Faizunessa Bibi,* I. L. R, 17 C, 168; *Sohan Lal* v. *Azizunissa Begum,* I. L. R, 7 A, 136.

The question now raised for decision was not decided in any of those cases, the only point decided therein being whether the decision of the lower appellate court on the preliminary point was on the facts found by it, open to any legal objection. I am of opinion that S. 584 defines the powers of the High Court in second appeals and that no reason can be conceived for larger powers being conferred in appeals from what is termed an order in an appeal, and what is in substance an appellate decree on a particular, or preliminary point or issue. Ss. 588 and 584 ought to be read together, and on so reading them, I can discover no legal foundation for holding that in appeals from orders of remand made in regular appeals by District Courts this court is not bound by the findings of fact on which the decision of the lower appellate court rests. Otherwise in appeals preferred from appellate decrees, the High Court would be bound to accept the findings of fact recorded by the district courts, whilst in appeals from remand orders which are substantially second appeals from the decision of the District Judge on appeal on a preliminary or particular point, the High Court would not be bound to accept the findings of fact. This seems to me to be an anomaly.

I dismiss this appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

Rama Reddy ... ... Appellant (*Plaintiff*).*

v.

Abbaji Reddy and 6 others ... ... Respondents (*Defendants*).

Interest *post-diem*—Interest Act XXXII of 1839—Transfer of Property Act S. 88—Charge on Property.

Rama Reddy *v.* Abbaji Reddy.

Even in the absence of a provision for interest after the due date in a mortgage—bond, the court can award interest at a reasonable rate under Act XXXII of 1839, as the money is payable at a certain time and under a written instrument. The joint effect of the Interest Act and S 88 of the Transfer of Property Act is in favour of the awarding of interest *post-diem* as interest till date of payment and as a charge upon the mortgaged property. *Bikramjit Tewari v. Durga Dyal Tewari,* (I. L. R, 21 C, 274 followed).

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* S. A. No. 1546 of 1893. 28th August 1894.

Second Appeal against the decree of the District Court of South Arcot in Appeal Suit 36 of 1893 confirming the decree of the Court of the District Munsiff of Cuddalore in Original Suit 1 of 1892.

The suit was brought by the plaintiff for the recovery of the principal and interest due on a mortgage bond dated 19th June 1875.

The terms of the bond in so far as they are material for the purpose of this appeal were :

"I shall pay you interest on the said sum of Rs. 800 at 3¼ per cent. per mensem on the 30th of Ani each year; besides I shall pay you the principal sum of Rs. 800 on the 30th Panguni of Pramathi year and redeem the mortgaged property. In default of such payment you shall proceed against the mortgaged property and realize the same with interest at 1 per cent per mensem from the date of this bond." The District Munsiff held that there was no provision for payment of interest *post diem* and that more than 6 years having elapsed between the due date and the date of suit, interest could not be awarded even as damages. On appeal the District Judge confirmed the Munsiff's decree. The plaintiff appealed to the High Court.

C. Ramachandra Row Sahib and *T. Rungaramanuja Chariar* for the appellant.

The Honorable *V. Bhashiam Iyengar* and *V. Krishnasawmy Aiyar* for the respondent.

JUDGMENT :—The District Judge has dismissed the appeal under S. 551 C. P. C. on the ground that *post diem* interest cannot be given. The terms of Exhibit I are not very clear, and it is possible that they may mean only that 12 per cent. interest is chargeable instead of 9 per cent. from date of bond to the date fixed for the repayment of the principal, and that in case of default the mortgagee should at once proceed to recover the principal and interest at the enhanced rate.

But though we are not able to hold that the interpretation put upon the bond I by the courts below is incorrect, we may point out that under the Interest Act XXXII of 1839 the court has

power to give interest upon mortgage-money, as it is money payable at a certain time and under a written instrument. Interest *post diem* may therefore be awarded at such rate as is reasonable, if not always at the rate mentioned in the contract.

The joint effect of the Interest Act and of S. 88 of the Transfer of Property Act is in favour of the award of interest *post diem* as interest till date of payment at a reasonable rate, and as a charge upon the mortgaged Property (see *Bikramjit Tewari* v. *Durga Dyal Tewari*, I. L. R, 21 C. 274)

As the District Judge has disposed of the appeal upon this point only and without hearing the Respondents, we must reverse the decree and remand the appeal for disposal. The costs in this appeal will abide and follow the result.

PRIVY COUNCIL.

[*On appeal from the Chief Court of the Panjaub*].

Present: —The Earl of Selborne, Lord Watson, Lord Hobhouse Lord Macnaghten, Lord Morris, Lord Shand and Sir Richard Couch.

Sirdar Gurdyal Singh ... ... Appellant (*Defendant*).*

v.

The Rajah of Faridkote ... ... Respondent (*Plaintiff*).

Sirdar Gurdyal Singh *v.* Rajah of Faridkote.

Foreign judgment—jurisdiction—international law—cause of action—Territorial jurisdiction.—Judgments of courts in Native States.

Territorial jurisdiction attaches upon all persons either permanently or temporarily resident within the territory while they are within it. It exists also as to land within the territory; and it may be exercised as to moveables within the territory; and in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled within the territory. In a personal action to which none of these causes of jurisdiction apply, a decree pronounced *ex parte* by a foreign court to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. Judgments of the courts of Native States having independent civil, criminal and fiscal jurisdiction must be regarded as foreign judgments and suits can be brought upon them in British courts.

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* 28th July 1894.

This was an appeal against the judgment of the Chief Court at Panjaub. The facts of the case will appear sufficiently from the judgment of their Lordships which was delivered by the Earl of Selborne :—

JUDGMENT :—*Earl of Selborne.* The Respondent, the Rajah of Faridkote, obtained in the Civil Court of that Native State, in 1879 and 1880, two *ex-parte* judgments, in two suits instituted by him against the Appellant, for sums amounting together to Rs. 76,474-11-3, and costs. For all the purposes of the question to be now decided, those two suits may be treated as one; the appeals to Her Majesty in Council having been consolidated. Two actions, founded on these judgments were brought by the Rajah against the Appellant in the Court of the Assistant Commissioner of Lahore and were dismissed by that Court, on the ground that the judgments were pronounced by the Faridkote Court without jurisdiction as against the Appellant. On appeal to the Additional Commissioner of Lahore, the judgments of the first Court were upheld. The Rajah then appealed to the Chief Court of the Panjaub, which differed from both those tribunals, and upheld the jurisdiction of the Faridkote Court.

Faridkote is a native State, the Rajah of which has been recognized by Her Majesty as having an independent civil, criminal and fiscal jurisdiction. The judgments of its Courts are, and ought to be, regarded in Her Majesty's Courts of British India as foreign judgments. The Additional Commissioner of Lahore thought that no action could be brought in Her Majesty's Courts upon a judgment of a Native State; but in this opinion their Lordships do not concur.

The Appellant was for five years, beginning in 1869, in the service of the late Rajah of Faridkote, as his treasurer; and the causes of action, on which the suits in the Faridkote Court were brought, arose within that State, and out of that employment of the Appellant by the late Rajah. The claim made in each of the suits was merely personal, for money alleged to be due, or recoverable in the nature of damages, from the Appellant. It is immaterial, in their Lordships' view, to the question of jurisdiction (which is the only question to be now decided), whether the case, as stated, ought to be regarded as one of contract, or of tort,

The Appellant left the late Rajah's service, and ceased to reside within his territorial jurisdiction, in 1874. He was, from that time, generally resident in another independent Native State, that of Jhind, of which he was a native subject, and in which he was domiciled; and he never returned to Faridkote after he left it in 1874. He was in Jhind when he was served with certain processes of the Faridkote Court, as to which it is unnecessary for their Lordships to determine what the effect would have been, if there had been jurisdiction. He disregarded them, and never appeared in either of the suits instituted by the Rajah, or otherwise submitted himself to that jurisdiction. He was under no obligation to do so, by reason of the notice of the suits which he thus received or otherwise, unless that Court had lawful jurisdiction over him.

Under these circumstances, there was, in their Lordships' opinion, nothing to take this case out of the general rule, that the Plaintiff must sue in the Court to which the Defendant is subject at the time of suit ("*Actor sequitur forum rei*"); which is rightly stated by Sir Robert Phillimore (*International Law*, Vol. IV, S. 891) to "be at the root of all international, and of most domestic, jurisprudence on this matter." All jurisdiction is properly territorial, and "*extra territorum jus dicenti impune non paretur.*" Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory, while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and, it may be exercised over moveables within the territory; and, in questions of *status* or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (*e.g.*, under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction, which any foreign Court ought to recognize, against foreigners, who owe no allegiance or obedience to the power which so legislates.

In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way

submitted himself, is by international law an absolute nullity. He is under no obligation, of any kind, to obey it, and it must be regarded as a mere nullity, by the Courts of every nation, except (when authorized by special local legislation) in the country of the *forum* by which it was pronounced.

These are doctrines laid down by all the leading authorities on international law; among others, by Story (*Conflict of Laws*, 2nd ed., Ss. 546, 549, 553, 554, 556, 586), and by Chancellor Kent (*Commentaries*, Vol. 1, p. 284, note c, 10th ed.) and no exception is made to them, in favour of the exercise of jurisdiction against a defendant not otherwise subject to it by the Courts of the country in which the cause of action arose, or in cases of contract by the Courts of the *locus solutionis*. In those cases, as well as all others when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice.

The conclusion of the learned Judges in the Chief Court of the Panjaub is expressed in the following sentence of the judgment delivered by Sir Meredyth Plowden, in the first of the two actions (Record 2, p. 164):—

"On the whole, I think it may be said, that a State assuming "to exercise jurisdiction over an absent foreigner, in respect of an "obligation arising out of a contract made by the foreigner while "resident in the state and to be fulfilled there, is not acting in con-"travention of the general practice or the principles of international "law, so that its judgment should not be binding merely on the "ground of the absence of the defendant."

If this doctrine were accepted, its operation, in the enlargement of territorial jurisdiction, would be very important. No authority of any relevancy, was cited at their Lordships' bar to support it, except *Becquet* v. *Macarthy* (2 Barn, and Ad. 951), and a passage from the judgment delivered by Blackburn J., in *Schibsby* v. *Westenholz*, (L. R. 6, Q. B. 155).

Of *Becquet* v. *Macarthy*, it was said by great authority in *Don* v. *Lippman* (5 Clark and Finnelly 1), that it "had been supposed to go to the verge of the law;" and it was explained, as their Lordships think, correctly, on the ground that "the Defendant held a

public office in the "very colony in which he was originally sued." He still held that office at the time when he was sued; the cause of action arose out of, or was connected with it; and though he was, in fact, temporarily absent, he might as the holder of such an office, be regarded as constructively present in the place where his duties required his presence, and therefore amenable to the colonial jurisdiction. If the case could not be distinguished, on that ground, from that of any absent foreigner who, at some previous time, might have been in the employment of a colonial Government, it would, in their Lordships' opinion, have been wrongly decided; and it is evident that Lord Justice Fry, in *Rousillon* v. *Rousillon*, (L R, 14 Ch, D . 351) took that view.

The words of Lord Blackburn's judgment in *Schibsby* v. *Westenholz* (L. R, 6 Q. B, 161) which were relied upon, are these :—

"If, at the time when the obligation was contracted, the "defendants were within the foreign country, but left it before the "suit was instituted, we should be inclined to think the laws of "that country bound them ; though, before finally deciding this, we "should like to hear the question argued."

Upon this sentence it is to be observed, that beyond doubt in such a case, the laws of the country in which an obligation was contracted might bind the parties, so far as the interpretation and effect of the obligation was concerned, in whatever *forum* the remedy might be sought. The learned judge had not to consider, whether it was a legitimate consequence from this, that they would be bound to submit on the footing of contract or otherwise, to any assumption of jurisdiction over them, in respect of such a contract, by the tribunals of the country in which the contract was made, at any subsequent time, although they might be foreigners resident abroad. That question was not argued and did not arise, in the case then before the court; and, if this was what Mr. Justice Blackburn meant, their Lordships could not regard any mere inclination of opinion, on a question of such large and general importance, on which the judges themselves would have desired to hear argument if it had required decision, as entitled to the same weight, which might be due to a considered judgment of the same authority. Upon the question itself, which was determined

in *Schibsby* v. *Westenholz, Mr. Justice Blackburn,* had at the trial formed a different opinion from that at which he ultimately arrived; and their Lordships do not doubt, that if he had heard argument upon the question, whether an obligation to accept the *forum loci contractus,* as having, by reason of the contract a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their Lordships do) to the conclusion, that such obligation unless expressed could not be implied.

Their Lordships will therefore humbly advise Her Majesty to reverse the decrees of the Chief Court of the Panjaub, and to restore those of the additional Commissioner of Lahore. The respondent will pay the cost of the appeals to the courts below, and of these appeals.

PRIVY COUNCIL.

[*On appeal from the High Court of the North Western Provinces*].

Present:—Lords Hobhouse, Macnaghten and Morris, and Sir Richard Couch.

Deo Kuar ... ... Appellant (*Plaintiff*).*

v.

Man Kuar ... ... Respondent (*Defendant*).

Deo Kuar v. Man Kuar.

Pensions Act XXIII of 1871 S. 4—Jurisdiction of Civil Courts—Malikana.

Where an owner of property makes over his proprietary rights to Government in consideration of receiving a sum of money per annum as Malikhana in perpetuity, the grant of money is one which comes within the words of S. 4 of the Pensions Act and the jurisdiction of the Civil Courts is excluded.

This was an appeal against the judgment and decree of the High Court of the North Western Provinces. The facts of the case in so far as they are material for the purpose of this report appear sufficiently from the following judgment delivered by Lord Hobhouse.

J. H. A. Branson for the appellant.

J. D. Mayne for the respondent.

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* 14th July 1894.

JUDGMENT: *Lord Hobhouse*:—This is a family dispute. The defendant, who is the present respondent, has been placed in possession of half the family property, and plaintiff who is appellant, and who is in possession of the other half, claims the whole. The family whose property is in question were Gujrati Banias who some time back migrated from Baroda to Banda, but retained some property in Baroda, and had relatives there. They were a joint Hindu family subject to the law of the Mitakshara. In the year 1868 Pransukh Ram the then head of the family died at Banda. He left surviving him his widow Jarao Bai, and one son Uttam Ram and two daughters. He had another son Ganga Ram, who predeceased him, leaving no issue. Uttam Ram, who took the whole inheritance, died on the 30th October 1875, leaving no male issue. The plaintiff is his widow. The defendant is the widow of Ganga Ram.

* * * * * * * * * * * * * * * * *

There is a minor point respecting the Malikana of Mouza Panchanahi, which amounts to Rs. 1,500 per annum. As between the plaintiff and defendant, it stands in exactly the same position as the other property, but the Subordinate Judge considered that the jurisdiction of the Civil Court is taken away by the Pensions Act, 1871. The plaintiff made it the subject of appeal to the High Court, but of course it was there merged in the larger issue decided adversely to her. She has raised the question again on the appeal. Mr. Mayne declined to argue it on the defendant's behalf. Mr. Branson submitted rather than argued it on behalf of the plaintiff; but he cited no authority, and their Lordships have not been able to find any bearing directly upon the subject.

The Pensions Act, 1871 enacts that "except as hereinafter "provided, no Civil Court shall entertain any suit relating to "any pension or grant of money or land-revenue conferred or made "by the British or any former Government, whatever may have "been the consideration for any such pension or grant, and what- "ever may have been the nature of the payment, claim or right for "which such pension or grant may have been substituted." The expression "grant of money or land-revenue" is interpreted to include anything payable on the part of Government in respect of any right, privilege perquisite, or office.

Mouza Panchanahi was taken into the hands of the Government and held *Khas* in or before the year 1880, and by a deed dated

in September of that year the plaintiff and defendant formally made over to Government their proprietary rights on consideration of receiving Rs. 2,000 per annum as Malikana in perpetuity. Malikana is the allowance made to proprietors so dispossessed. By regulation VII. of 1882 it might vary from 5 to 10 per cent of the income realized. That Regulation was repealed as regards the North-West Provinces by Act XIX. of 1873, and fresh provisions for allowances to dispossessed proprietors were substituted. It does not appear under what circumstances the Mouza was taken into *khas* management, but it cannot be doubted that the allowance stipulated for and granted was of the nature indicated by the term Malikana, *i.e.*, a grant of a portion of the revenue in lieu of pre-existing proprietary rights.

It is at first somewhat surprising that a property which has been the subject of bargain and of formal grant should be excluded from the cognizance of Civil Courts. But it cannot be denied that it falls within the literal construction of the words of the Pensions Act *i.e.*, it is something payable on the part of Government in respect of a right. And the decision of this committee in *Vasudev Sadashiv Modak* v. *The Collector of Ratnagiri* (L. R. 4 Ind. App. 119) and again in *Maharaval Mohansingji Jeysingji* v. *The Government of Bombay* (L. R. 8 I App, 77) shows that the language of the act applies to cases in which the grant has been made in consideration of prior rights vested in the grantee. In the former case, the subject of the suit was a grant made by the Peishwa to an hereditary deshmukh authorizing him to levy dues from the ryots, which dues were subsequently collected by the British Government and paid over to the deshmukh. In the latter case the subject was a *toda garas hakk*, which, though originating in blackmail, had long been recognized as property capable of alienation and of seizure and sale in execution, and the liability for which had been assumed by the British Government. In both cases it was held both by the Courts below and by this Committee that the Civil Courts were incapacitated by the Pensions Act from entertaining suits. It is not for their Lordships to examine into the relations between the Government, the farmers, the ryots, and the grantees of Malikana, or the previous state of the law, or the other considerations which may have dictated the policy of the Pensions Act. It is enough if its effect is expressed in clear terms. The plaintiff might have

applied for a certificate which would have enabled the court to make some declaration of right as between her and the defendant, but she did not do so, and must submit to the disability which the Act imposes upon the Court.

The plaintiff fails to get the decree of the Subordinate Judge altered in her favour in this respect, but it does not appear that her claim to do so has had any effect on the costs of this appeal. Their Lordships will humbly advise Her Majesty to discharge the decree of the High Court, except in so far as it disallows with costs the objections of the plaintiff to the decree of the Subordinate Judge; to dismiss the defendant's appeal to the High Court with costs; and to restore the decree of the Subordinate Judge. The defendant must also pay the costs of this appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

Soundarammal and another...	... Aplts. in No. 63 (4th and 5th *Defendants*).
Velayudam Pillai and others ...	... Appellants in No. 64, (7th, 10th, 11th, 13th, 14th, 16th, 17th and 18th 19th and 20th *Defendants*).
v.	
Rengasami Mudaliar and others	... Respdts. in both the appeals 1, 2, & 3 (*Plffs*).

Soundarammal *v.* Rungasami Mudaliar.

Hindu Law—Inheritance—Sister's daughter—Mother's sister's daughter—Paternal uncle's daughter's son—Bandhus—preferential heir—Alienation by guardian—Limitation.

The sister's daughter is not a bandhu and if entitled to inherit as a relative, can come in only after bandhus. The paternal uncle's daughter's son being a bandhu *ex parte paterna* is a preferential heir to the mother's sister's son who is only a bandhu *ex parte materna*. Where the mother of a minor alienated certain property as his guardian in 1861 and succeeded to him on his death and a suit was brought for the recovery of that property in 1891 after her death in 1890, *held* that the suit was barred by limitation.

Appeals against the Decree of the District Court of Coimbatore in Original Suit No. 7 of 1891—*Appeal* 63 in so far as it decrees ⅛th of items 2, 17, 22 and 26 of Schedule I and items 6 and 7 of Schedule II of the plaint and *Appeal* 64 in so far as it declares the alienations made by Thanathammal and Parvathiammal in favour of the appellants are not binding on the plaintiffs.

V. Bhashiam Aiyangar and *T. Jivaji* for appellant.

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* A. S. Nos. 63 and 64 of 1893. 2nd May 1894.

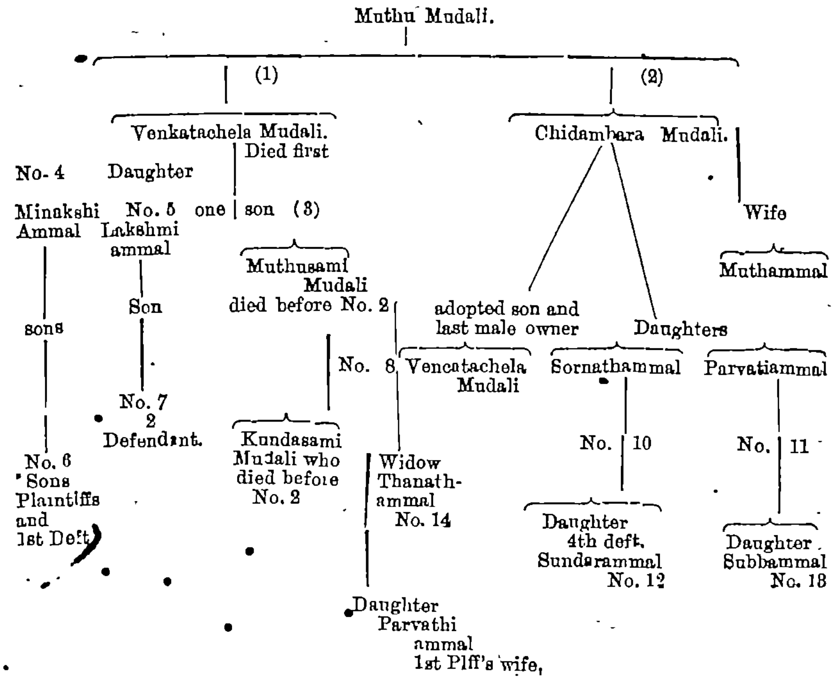
S. Subramaniem and *T. Rungaramanuja Chari* for respondent.

The court delivered the following.

JUDGMENT :—These two appeals are preferred from the decree of the District Court of Coimbatore in O. S. 7 of 1891, No. 63 by defendants 4 and 5 and No. 64 by defendants 7, 10, 11, 13 to 15 and 17 to 20.

The properties in dispute belonged to Chithambara Mudali. Upon his death they devolved on his adopted son Vencatachela Mudali, the last full owner. He died unmarried during his minority and his adoptive mother Muthammal succeeded him. Upon her death in May 1890, several persons claimed the right of succession.

The three plaintiffs and defendants 1 and 2, the third defendant, and defendants 4 and 5 are the several classes of relations who claimed the succession. The third defendant claimed to be a Dayadi or Sapinda of Venkatachela Mudali, the last male owner and also his mother's sister's son. The 4th and 5th defendants are the daughters of two sisters of Venkatachela Mudali, and the plaintiffs and defendants 1 and 2 are the daughter's sons of Venkatachela Mudali, the senior, who was the paternal uncle of the last male owner. The subjoined genealogical table shows how the several claimants are related to each other and to Venkatachela Mudali.



The eight issues fixed in this case indicate the contentions of the parties now in possession of the several items of property and the several defences set up by them. The Judge decided the 1st issue for plaintiffs and the 2nd and 3rd issues against 3rd defendant. As to the 5th and 8th issues, his decision is that Muthammal did make a gift of the lands to the several defendants, but that it is not proved that she had authority to do so.

As plaintiffs and defendants 1, 2, 3, 6 and 12 entered into a compromise pending decision, the Judge has recorded no findings on the 4th, 6th and 7th issues.

Against his decision two sets of defendants have appealed.

A. S. 63.

The appellants' first contention is that the judge's finding that 3rd defendant is not a Dayadi is contrary to the weight of evidence. The judge has stated his reasons for his finding in paragraphs 4 to 6 of his judgment. On reading the evidence, we see no sufficient reason to come to a different conclusion. The evidence consists in the main, (1) of declarations made by Muthammal and (II) of those alleged to have been made by Chidambara Mudali, her husband and (III) of statements of witnesses that he is a Dayadi and that he performed the funeral and other obsequies of both Chidambara Mudali and his widow. The witnesses who depose in appellants' favor and to admissions of 3rd defendant's relationship are mostly unconnected with the family and their statements are not consistent with each other. In endeavouring to help the appellants, several go too far when they say that 3rd defendant was not only a *gnati* but also a coparcener or undivided *gnati* and that he performed Chidambaram's obsequies while the last male owner, his adopted son, was alive. It is true that there is documentary evidence in support of Muthammal's admission but as observed by the judge, it is not safe to attach weight to it. Admittedly the 3rd defendant is her sister's son and she made the admission on occasions when she had reason to be specially kind to him. The contention that he is a *gnati* or Sapinda must be disallowed as not proved.

Another contention in appeal is that 5th defendant's 1st witness Subbaraya Mudali is also a Sapinda of the last full owner. The judge refers to Subbaraya Mudali in paragraph 4 of his

judgment and remarks that he has made no attempt to secure the reversion. We observe further that 4th and 5th defendants did not plead his *status* as a Sapinda in answer to plaintiffs' claim or ask for an issue in regard to it.

It is, however, admitted that 3rd defendant is the son of Muthammal's sister and therefore mother's sister's son of the last male owner. The judge finds, and it is also proved, that during her life, Muthammal gave portions of the property in dispute to 4th and 5th defendants who are her daughters with the consent and approval of 3rd defendant and his wife and to the other defendants. As plaintiffs' relationship to Venkatachella Mudali is admitted, the question of law arising for decision is whether as the sister's daughters of Vencatachela or by reason of the consent of his mother's sister's son, the 3rd, 4th and 5th defendants exclude plaintiffs from succession. In paragraph 2 of his judgment the judge relies on the table of succession in Mayne's Hindu Law, Ss. 466 and 535 and concludes that uncle's daughter's sons are preferable heirs as compared either with sister's daughters who have no place among Bandhus, or with the maternal aunt's son who is only related on the mother's side. Appellants' Pleader contends that male Bandhus are to be preferred to females only when they belong to the same class and that appellants are entitled to the reversion. In support of his contention he relies on the case reported at *Muthusami* v. *Muthukumarasami*, I. L. R, 16 M, 23. On the other hand it is urged for Plaintiffs that as Bhinna Gotra Sapindas on the father's side, they are the next reversioners and reliance is placed on the decision reported at *Umaid Bahadur* v. *Uddi Chand*, I. L. R, 6 C, 119.

We are of opinion that the contention on Appellants' behalf cannot be supported. As sister's daughters they are not Bandhus in the sense that Bandhus are Bhinna Gotra Sapindas, as stated in Chapter II S. 5 *placitum* 5 of the Mitakshara and if they are heirs, they can only take after them as female relatives according to the decision of the High Court reported at I. L. R, 16 M, 23.

There can be no doubt that whatever their rights may be as relatives, they cannot exclude male relatives who, as Bhinna Gotra Sapindas or regular Bandhus are entitled to succeed under the Mitakshara Law in preference to them.

The learned pleader for the appellants argues that under Hindu Law males exclude females only when they belong to the same class of relatives; but to this proposition we cannot accede. Take for instance, the case of competition between a sister and the son of another sister, and it cannot be denied the latter excludes the former, because he is a Bhinna Gotra Sapinda whilst the sister is a mere relative and being a female can offer no funeral oblations. Again it is a well known pirnciple of Hindu Law that when in the table of succession one class of heirs ranks above another, the class that is named first must be exhausted before the class that is named next can be let in as in the case of a brother and nephew, or of nephew and brother's grandson. As female relatives form a class inferior to male Bhinna Gotra Sapindas as in the case of a sister and sister's son, plaintiffs as daughter's sons of the last male owner's paternal uncle, are preferable heirs to the appellants who are only his sister's daughters who if as such, in the list of heirs at all, have a place therein as mere relatives, before the property escheats to the crown. As between plaintiffs and the 3rd defendant the latter is a Bandhu *ex parte materna* whilst the former are Bandhus *ex parte paterna*. The decision in *Muthusami v. Muthukumarasami*, (I. L. R. 16 M, 23) is not in point. There, the competition was between a maternal uncle and the father's paternal aunt's son both of whom were Bhinna Gotra Sapindas and Bandhus.

This appeal must fail and is dismissed with costs.

R. A. 64.

As regards appeal No. 64, it refers to the contention which forms the subject of the 8th issue. The properties to which it relates passed into appellant's possession from that of one Thanathammal, a widow of one of the first cousins of the last male owner, No. 14 in the pedigree. The Judge finds as a fact that Muthammal the widow of Chidambara Mudali and his adopted son—the last male owner—executed a deed by way of partition assigning certain lands to the mother and daughter in 1861. He was of opinion that Muthammal had no right to convey the lands absolutely and that her son was then a minor, but that effect could be given to the alienation as a provision for maintenance which it was competent to Muthammal to make. On this view, he held that the alienation

was not binding upon the reversioners as a body after the demise of Thanathammal and that in the meantime, the plaintiffs were not entitled to claim possession, and passed a decree accordingly. He declared the title of plaintiffs as reversioners as a body after Thanathammal's death, because he did not desire to adjudicate on the effect of 1st plaintiff's attestation of document IX whereby Thanathammal and her daughter Parvati, who is 1st plaintiff's wife, conveyed the lands in dispute for Rs. 6000 in July 1876 to one Aravan Pusari. The contentions on appeal are (1) that no declaration ought to have been made (2) that defendants 3, 4 and 5 are as Bandhus preferable heirs (3) that a suit for a declaration of title was barred by limitation, and (4) that it was competent to Muthammal as the guardian and adoptive mother of her minor son to alienate absolutely a portion of the property in lieu of maintenance. We don't think that the Judge's decree can be supported so far as it is against these appellants. He finds as a fact that the alienation was made by Muthammal and her minor son and that what was conveyed was an absolute estate. As the last male owner was alive, the alienation was not that of a widow's estate by a widow, but that of an absolute estate by the guardian of the last male owner. It was open to any next friend of his to have stepped forward during his minority and set aside the alienation on the ground that it was an act done without adequate necessity or in excess of the limited authority of a guardian. As the alienation took place in 1861 and the present suit was brought in 1891, a suit to set it aside would be barred, if the minor were still alive and his reversioners cannot take a higher position. The Plaintiffs' claim must therefore be held to be time-barred.

This appeal must be allowed and the Decree of the Judge set aside, so far as it refers to the properties in appellants' possession with costs throughtout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Muthuswami Aiyar.

Appachi Seetharam Patter ... .. Petitioner (*Petitioner*).*

v.

Valia Veetil Parukutti and others ... Respondents (*Countr. Petrs*).

Seethalama Patter. v. Parukutti.

Civil Procedure Code Ss. 206 and 622—High Court's Powers in revision—Separate costs—Rule 37 of Rules under the Legal Practitioner's Act.

Where the judgment in a case dismissing the suit did not award separate costs to the defendants, but separate costs were entered in the decree, held that the court could correct the error, under S. 206 of the Civil Procedure Code. Where, in correcting the error, the court directed separate costs to be entered for separate defendants, striking out the separate costs in favour of others, held that the High Court has power under S. 622 of the Civil Procedure Code, to direct that only one set of costs should be allowed to all the defendants together.

Under Rule 37 of the rules framed by the High Court under the Legal Practitioner's Act, to entitle the defendants to separate sets of costs, not only should they set up separate and distinct defences, but they should also succeed on different defences.

Petition under S. 622 of the Civil Procedure Code, praying the High Court to revise the order of the court of the District Munsiff of Quilandy dated 5th April 1893 passed on Miscellaneous petition No. 755 of 1893 (in Original Suit No. 338 of 1891).

P. R. Sundra Aiyar for Petitioner.

K. R. Subramanya Sastri for Respondents.

JUDGMENT:—The judgment awarded no separate costs but the decree awarded separate costs. To this extent there was variance between the judgment and the decree. The Munsiff had jurisdiction to interfere under S. 206 of the Civil Procedure Code. No separate costs can be allowed under Rule 37 of the Rules framed by the High Court under the Legal Practitioner's Act unless separate defences were set up and the defendants succeeded upon those defences; neither the 7th and 8th nor the 11th and 12th defendants succeeded on their separate defences. That the Panayam deed sued on was without consideration and the debt was not binding are common grounds upon which alone the plaintiff's suit failed. The District Munsiff is in error in awarding separate Vakil's fees to 7th and 8th defendants and to 11th and 12th defendants. He ought to have awarded them only one. When a court owing to the misconstruction of a rule of practice exercises a power or jurisdiction which it would not have but for the misconstruction, it is a proper case for interference under S. 622. The District Munsiff's order will be modified accordingly. Defendants 7, 8, 11 and 12 will pay petitioner's costs in this court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Muthuswami Aiyar.

Nanda Varapu Peda Latchanna ... Appellant (*Plaintiff*).*

v.

Soory China Sarvayya and others ... Respondents (*Defendants*).

Latchanna *v.* Sarvayya.

Civil Procedure Code S. 13—*Res judicata* between co-defendants.

Where certain land was claimed by a plaintiff against certain defendants as liable to redistribution among them all as Agraharamdars and the first defendant's claim to it as an Inam was negatived, held that though the suit having been tried *ex parte*, there was no active contest by the defendants, the decision in that suit has the force of *res judicata* in a subsequent suit between the other Agraharamdars and the former first defendant. *Chandu* v. *Kunhamed*, I. L. R., 14 M, 325.

Appeal against the remand order of the Subordinate Judge's court of Vizagapatam dated the 10th day of August 1892 passed in appeal Suit No. 172 of 1891 presented against the decree of the court of the District Munsif of Yellamanchuli in Original Suit No. 537 of 1890.

R. Subramanya Aiyar for appellant.

R. B. Michell for respondent.

JUDGMENT : *Muthuswami Aiyar*—The question for determination in this appeal is whether the 1st defendant's claim to the land in dispute as his Inam is *res judicata*. The facts of the case are sufficiently stated by the Subordinate Judge in paragraph 7 of his Judgment. It is observed by him that between the plaintiff and the defendants in the previous suit including plaintiffs and 1st defendant the question is certainly *res judicata*. Though the plaintiff and defendants in the present suit were merely co-defendants in the previous suit and though they were *ex parte* and there was no contest between them yet my decision in this case must depend on explanation V of S. 13 of the Code of Civil Procedure. It was held with reference to that explanation in the case reported in I. L. R., 14 M, 325 and 327, *Chandu* v. *Kunhamed*, that though the 1st defendant in that case under whom the then plaintiff claimed was *ex parte* in the previous suit and the title of the 2nd defendant cannot therefore be said to have been actively contested between

* C. M. A. No. 5 of 1893. 3rd August 1894.

the first and 2nd defendants yet the 1st defendant and his other co-sharers must be held as claiming under the plaintiff in the previous suit by explanation V of S. 13 of the Code of Civil Procedure. The case now before me is on all fours with that case. The parties to this suit were co-defendants in the previous suit and though they were all *ex parte*, the land in question was claimed by the then plaintiff as part of the Agraharam land which was liable for redistribution among him and the defendants who are other Agraharamdars and his co-sharers. It was the 1st defendant who claimed the land in question as his Inam, in execution, but his claim was disallowed under S. 244. Upon these facts, it is clear that the other co-defendants who were co-sharers in the Agraharam with the plaintiff in the previous suit must be taken as claiming under him as he claimed the land as common to himself and the other Agraharamdars and as such partible amongst them. The principle on which this explanation rests is that when an adjudication is necessary to give the appropriate relief to the plaintiff in the present suit, the adjudication is *res judicata* even as between co-defendants when the right asserted by the plaintiff and decided in the previous suit was one so asserted and decided as common to himself and others.

The order of the Subordinate Judge must be set aside and the decision of the District Munsif restored. Respondents will pay appellant's costs both in this court and in the lower appellate court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Shephard.

Pana, Ravanna, Mana, Ana, Alagappa Chettiar. Applt. (*Plff.*)*

v.

Kana, Rcona, Kana Vellian Chetti and another. Respdts. (*Defts.*)

Alagappa Chetti. *v.* Vellian Chetti.

Joinder of parties—Suit by Manager on document executed in his name—Section 22 Limitation Act.—Amendment of plaint.

Where the Members of an undivided Hindu family constitute a trading firm and a salary chit is executed by an agent to the manager of the family, *held*, in an action against the agent on the salary chit, that all the members of the family should be joined as parties and that an action by the managing member alone is bad, notwithstanding the assent of the other members to his suing alone.

* A. S. No. 65 of 1894. 2nd October 1894.

Held also that the plaint ought not to be allowed to be amended by the addition of the other members, where such an amendment would either deprive the defendants of the defence of limitation or the amendment is useless, the suit being liable to be dismissed under Section 22 of the Limitation Act.

Appeal against the decree of the Subordinate Judge's court of Madura (East) in Original Suit No. 4 of 1893.

S. Subbramaniem and *V. C. Desikachariar* for Appellant.

R. F. Grant for the 1st Respondent.

P. S. Sivaswami Iyer for the 2nd Respondent.

JUDGMENT.—It appears from the plaint that the 1st Defendant Vellian was on the 19th January 1887 engaged by the plaintiff to carry on his business in Moulmein for a period of three years and that accordingly he did act as the plaintiff's agent till the 17th December 1889 when he left Moulmein. It is charged against the 1st defendant that during the period of his agency he acted in contravention of the plaintiff's orders and that on his return to this country he refused to render proper accounts. The plaint was presented on the 14th January 1893.

On the 14th August 1893 the defendants put in separate written statements in both of which it is objected that the suit is bad for non-joinder of parties, because the plaintiff is only one of several members of a Hindu family carrying on business in partnership together. On the same day, the 14th August, certain preliminary issues were adjusted with reference to this objection. By the first of them the question of fact is raised. "Whether (as alleged in the plaint) the plaintiff is sole owner of the firm P. R. M. A. in Moulmein, or whether such firm has other partners, or belongs to a family which has other members." On the 2nd November certain persons describing themselves as members of the family of the plaintiff Alagappa put in a petition stating that Alagappa was the manager of the family business and that the 1st defendant was by him alone appointed agent, and asking that the plaintiff might be permitted to proceed against the defendants.

On the 14th November the plaintiff himself filed a petition praying that, if the court holds that the other members of his undivided family should also be parties, they might 'also be described as plaintiffs.' On the same day the trial of the preliminary issues took place. The plaintiff Alagappa was examined as a witness. He at once admitted that he was not the sole owner of the firm

but that five persons in all named by him as members of his family were interested in it. The witness proves the execution by the 1st defendant Vellian of the document (A) called a salary chit and explains that the letters P. R. M. A. appearing in that paper before his name Alagappa are not his own initials but stand for the firm's name.

On the evidence the judge held that the plaintiff was not competent to maintain the suit in his own name only. Further with reference to the petition presented on the same day, but after he had expressed an opinion adverse to the plaintiff, he refused to allow any addition of new parties. The suit was accordingly dismissed. The appeal was supported on alternative grounds. It was argued that the plaintiff Alagappa was competent to maintain the suit in his own name, or in the alternative that the designation of the plaintiff in the cause title was sufficient to denote all the persons interested in the firm. There can be no doubt that as a general rule all the members of a partnership firm ought to be joined as plaintiffs in a suit brought in respect of transactions with the partnership. It makes no difference that the persons, carrying on business together, were also members of a Hindu family, *Kalidas Kevaldas* v. *Nathu Bhagvan*, I. L. R., 7 B, 217 and cases cited. The proposition that the manager of a Hindu family can sue without joining those interested with him is one which cannot be supported and no authority was cited in support of it save a dictum in *Arunachala Pillai* v. *Vythilinga Mudaliyar*, I. L. R., 6 M. 27, 28. There can be no doubt in the present case that the employment of Vellian as agent was an employment in the business of the firm and that the contract was made by Alagappa on behalf of the firm. The Appellant's Vakil, however, endeavoured to convince us that Alagappa, though acting for the firm made the contract in his own name under such circumstances as to entitle him to sue alone. The case of *Agacio* v. *Forbes*, 14 M. P. C. 160, was cited and it was urged that similarly here Alagappa was entitled to sue alone. In *Agacio* v. *Forbes* it is true that the contract made in Hongkong between the plaintiff and the defendant was made for the benefit of the plaintiff's firm; but the consideration for it, namely, the forbearance by the plaintiff from proceedings threatened against third parties, was a consideration moving from the plaintiff alone,

for he alone was in Hongkong representing his firm which carried on business in Valparaiso.

If instead of being a partner Agacio had been a mere agent of a foreign principal, the case would have come within the principle recognized in S. 230 (1) of the Contract Act. And in considering the question of parties to an action, the case of partners, and that of agent and principal, stand on the same footing, the question in either case being, with whom was the contract made in point of law *Lindley*, on Partnership 487.

For these reasons we think that the authority cited is not applicable. In the present case there is nothing to show that the right of suing on the contract was restricted to the plaintiff, *Lucas* v. *De la cour* 1 M, S. 249. On the contrary it appears on the face of the salary chit that the retainer is by the firm and not by Alagappa in his individual capacity. It follows that the general rule above stated requiring the joinder of all the partners must apply. See *Lindley* on Partnership, 3rd Ed., 486 & 489.

This being so, we are asked to read the name of the plaintiff given in the cause title as designating not Alagappa only, but his partners or coparceners. It seems to us impossible in the circumstances of the present case to say that there is a misdescription as was held to be the case in *Kasturchand Bahiravdas* v. *Sagarmal Shriram* I. L. R, 17 B, 413. It is abundantly clear that the plaint was not read by the plaintiff's Vakil in the manner in which we are now asked to read it, for otherwise the pleader would not have gone to trial on the issue raised by the judge with regard to the question whether the plaintiff had other partners. It is contended that the pleader misconstrued the plaint, but the mistake is by no means obvious and we must assume that the party is duly represented by his pleader.

We are clearly of opinion that the defect is one which could only be cured by the addition of the persons who along with Alagappa constitute the plaintiff's firm or family. It remains then to consider the question whether even at this stage those persons ought to be brought on the record. No formal application to that effect was made in the court below, nor is any such application

made before us. On the respondents' behalf it is said that the required amendment ought not now to be made, because any claim against Vellian by the partners of Alagappa would be barred by the statute of limitation. Even on the 14th August when the informal application was made on behalf of those persons, such a suit would equally have been barred. On the other hand the plaintiff had elected to go to trial without offering to amend and therefore ought to be left to the consequences. *Dular Chand* v. *Balram Das* I. L. R, 1 A, 453.

The case of *Mohummid Zahoor Ali Khan* v. *Mussumut Thakooranee Rutta Koer*, 11 M. I. A. 468, 486 was cited in support of the contention that the possibility of the bar of limitation afforded a reason for allowing an amendment. That case is, however, plainly distinguishable from the present and from *Weldon v. Neal.* In *Mohummid Zahoor Ali Khan* v. *Mussumut Thakooranee Rutta Koer*, 11 M. I. A., 468, 486 the mistake made consisted not in the non-joinder of parties or the omission of any statement of claim, but in the joinder of parties who ought not to have been joined. In the result the cause was remitted for trial on the issues touching the liability of the defendant Rutta Koer on the bond in respect of which the suit had been brought. It is not necessary to consider what would be the consequence if the other partners were joined as to which point several cases were cited *Kalidas Kevaldas* v. *Nathu Bhagvan*, (I. L. R., 7 B, 217, Appeal No. 31 of 1887; Appeal No. 150 of 1893 and Appeal No. 55 of 1893).

In our opinion the amendment which, as has been observed, was never asked for in this court or in the court below ought not now to be made.

If by the amendment the defendants were deprived of the defence of limitation, then according to the view taken in *Weldon* v. *Neal* 19 Q. B. D. p. 394 and followed in this court *Mallikarjuna* v. *Pullayga* I. L. R, 16 M, 319 the amendment ought not to be allowed. On the other hand if the amendment must by the operation of S. 22 of the Limitation Act lead to the dismissal of the suit then it would clearly be useless.

The Appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Muthusami Aiyar and Mr. Justice Shephard.

Alagappa Mudaliar ... . Appellant (*Plaintiff*).*

v.

Sivarama Sundara Mudaliar and others. Repondents (*Defendants*).

Alagappa v. Sivarama Sundara.

Trusteeship alienation of, invalid—Sale of property valid though coupled with sale of trusteeship—Agreement to divide—Suit for specific performance—Joinder of defendants—S. 28, C. P. C.

Where the grantor and his descendants had been successively managing a charity and there was no deed of endowment or other evidence, showing the course of devolution of the right of management, held that all the sons of the previous rightful manager were entitled to be trustees and an alienation of their rights by some in favour of one of them which amounts to a complete divesting of their rights and not a mere delegation of powers liable to resumption is invalid.

A sale by some of the members of an undivided Hindu family to another of them of their rights as joint trustees of a charity and of their share in family property for one entire sum. is valid to the extent of the family property and the purchaser is entitled to a decree for it, if he does not claim an apportionment of the consideration. A completed agreement to effect a partition of family property in certain ways can be the basis of a suit for specific performance and the court may pass a decree, directing a deed of partition to be executed, though as part of the agreement, it was intended by the parties that a deed of partition should be drawn up, but was not.

Held also that in a suit for specific performance upon an agreement of partition entered into by the plaintiff and the 1st defendant, the son of the 1st defendant may be impleaded as a defendant under S. 28 C. P. C., though no specific performance can be claimed against him, he not having been a party to the agreement, and the relief prayed for against him was merely a declaration that the agreement was binding upon him.

Appeal against the decree of the Subordinate Judge's Court of Tinnevelly in Original Suit No. 36 of 1889.

S. Subramaniem & V. Krishnaswami Iyer for appellant.

C. Ramandra Row Sahib, M. R. Ramakrishna Iyer & C. R. Thiruvenkatachariar for first respondent.

V. C. Seshachariar for third respondent.

ORDER :—This is an appeal from the decree of the Subordinate Judge dismissing the suit without costs. The judgment of the Subordinate Judge which on the substantial issues of fact (the

* A. S. No. 23 of 1894. 25th October 1894.

1st, 2nd, 3rd and 6th) is in the plaintiff's favour, proceeds upon certain grounds of law upon which also the arguments in the hearing of the appeal turned. The judge's findings on the facts were not questioned. It is found as a fact that by agreement between the three brothers a sale of certain properties by auction was effected and the plaintiff became the purchaser. The terms of the whole arrangement are set out in Exhibit E. This sale included among other things the *huk* right of Vachakarapatti Choultry, the lands attached to the Choultry and certain other lands the Kudivaram of which is vested in the family. As to these latter it is asserted on the defendant's behalf that they also are part of the charity property. There has been no finding on the point.

The Vachakarapatti Choultry is one of several charities managed by the family to which the parties belong. It is admittedly a public charity. There is no direct evidence as to the conditions fixed by the founder for the management of the choultry and its property or for the devolution of the right of management. In the Inam statement made by the plaintiff's father Thittarappa, Chidambaranatha who is described as the latter's great grandfather and manager of the charity, appears under the heading "name of the original holder." In another column it is said "the Inam was granted to my ancestors by the Carnatic Rajah's for the purpose of conducting charity in the choultry etc." Thittarappa, it appears, was one of three brothers who having previously divided among themselves their family property, in 1871, proceeded to divide the family charities. It is recited in the deed of 26th May 1871 that it was at first settled to manage in common the charities attached to the family, but that they had since come to another arrangement with regard to the same. Under that arrangement the Choultry now in question fell to the share of the plaintiff's father. He died in July 1877 leaving 2 sons Alagappa and Sivarama Sundara the plaintiff and defendant No. 1 and a third, then a minor, now defendant No. 2. In the same year it was agreed between the two adult brothers, that although the *hukdarship* was common to three, it should be registered in the name of the eldest the defendant No. 1. This is all the evidence adduced with regard to the management of the Choultry and it is not likely that more would be forthcoming, in as much as it appears from the pedigree that the

grand-father and great grand father of Thittarappa each left only one son. Judging from the scanty materials available, we think it must be taken to have been the intention of the founder of the Choultry that the office of manager should be held in common by the family of the original holder. No other rule of succession can well be suggested. The fact that in 1871 a division of the charities then belonging to the family took place is by itself no ground for holding that any other rule than that above stated holds good with regard to this choultry. It was argued by the plaintiff's Vakil that although the office of superintending religious or charitable institutions cannot be alienated like ordinary property, it is competent to any one member of the family interested to renounce or waive his right in the matter, *Mancharam* v. *Pranshankar* (I. L. R, 6 B, 298). Our attention was also called to the cases in which it has been held that one person may by force of the law of limitation lose his right to such an office and another may in the same manner acquire it. It is true that there is an apparent inconsistency in holding that by operation of law an alienation may be effected which cannot be effected by an act of the party. It may be suggested that the explanation lies in the fact that the law of limitation is a law of a general and positive character and that no exemption from it is allowed in the case of charitable or religious offices. It is well settled that such offices cannot be alienated by the act of parties. The question then is whether the arrangement made in the present case amounts to an alienation. If it was a mere arrangement for the more convenient management of the choultry, reserving to the plaintiff's brothers their right of control and, if necessary, of resumption of actual management, then it might be said that there would be no interference with the suppposed will of the founder and that the arrangement would be lawful. To that extent it seems clear that any coparcener jointly entitled to management may waive his rights. But the transaction now before us is of a very different character. It is clearly intended that the brothers other than the plaintiff shall divest themselves altogether of all right of control over the choultry. For the future it was intended that the right of management should devolve in the line of Plaintiff and his heirs to the exclusion of his brothers. In our opinion it makes no difference that the alienee is a member of the same family. (See *Kuppa Gurukal* v. *Dorasami Gurukal*, I. L. R, 6. M. 76 and

Narayana v. *Ranga*, I. L. R, 15 M, 183). We think the Subordinate Judge was right in holding the alienation to be invalid.

The next question is whether the judge was right, in consequence of this ruling and for the other reasons given by him, in dismissing the suit altogether. His main reason for dismissing it was that in his view the stipulation that a formal document should be drawn up and registered showed that neither party intended to be bound until that was done. The Judge refers to *Ridgway* v. *Wharton*, 6 H. L. C. 238.

In our judgment, the Subordinate Judge has misunderstood the law and the observations made in the case cited. The plain question is whether in fact the terms of the agreement have been definitively settled, or whether the matter rests in the stage of negotiation. Here there is no doubt that terms of the arrangement had been finally determined. There was a full and complete agreement between the parties and they must, as observed by Lord Cranworth, be bound by it, notwithstanding that they intended to have a formal agreement drawn up. (6. H. L. C. 268).

Then it is said that, as part of the agreement is void and therefore cannot be enforced, the plaintiff ought not to have a decree for specific performance as to the remainder. But for the offer made before us by the plaintiff's Vakil, there would certainly be a difficulty in decreeing specific performance in part. The plaintiff is by the contract under an obligation to pay Rs. 7,500 as the price of two properties. It is not clear whether he has paid the money, or not. However, he is willing to pay it as the price of the one property only in respect of which the agreement is lawful. That being so, no question arises as to the apportionment of the money between the legal and the illegal parts of the transaction. The plaintiff being content to pay the whole consideration, we see no reason why the defendants should not be compelled to perform that part of the contract which is lawful. The defendant's Vakil could not suggest that there would be anything inequitable in such a decree; he only objected that the plaintiff's offer was not made in the court below. This is a matter with which we can deal in our order as to costs.

On behalf of the defendant No. 3 the minor son of defendant No. 1, a further objection is taken to the frame of the suit. It is

said that he was improperly made a party to a suit for specific performance, because he was not a party to the contract and no other cause of action could properly be joined in this suit. It is clear that against him there can be no decree for specific performance, and indeed the plintiff does not ask for such relief against him. But the plaintiff is interested in having him before the court in order to obtain an adjudication against him as well with regard to the existance of the contract as with regard to the question whether the contract is of such a nature as to be binding on him. The objection that such a decree as is required against the defendant No. 3 is one which cannot be combined with a decree for specific performance against the other defendants appears to us to be met by S. 28 of the Code of Civil Procedure. According to that section all persons may be joined as defendants against whom the right to any relief is alleged to exist whether jointly, severally or in the alternative in respect of the same matter. The reasons for giving this latitude are explained in *Honduras Railway Company* v. *Tucker* L. R., 2 Ex. Division 301 where also specific performance was part of the relief claimed. We observe that this authority is not mentioned in *Luckumsey Ookerdu* v. *Fazulla Cassumbhoy*, I. L. R, 5 B, 189, a case somewhat resembling the present. It appears to us that there is here one and the same matter, namely, the contract between the plaintiff and his adult brothers in respect of which he has a right to relief against them and also against the minor defendant. It is immaterial that the relief is not the same in both cases *Janokinath Mookerjee* v. *Runjun Chuckerbutty* I. L. R., 4 C. 949 and *Rajdhur Chowdhry* v. *Kallkristna Bhattacharjya*, 8 C, 963). Certainly the present case is within the reason of the rule, for it would be most inconvenient to leave to be decided in another suit against the minor defendant the question above mentioned. Of these questions, the latter has been left undetermined, although in the written statement of the minor defendant there is an allegation that the arrangement between the three brothers is prejudicial to his interests. If the plaintiff desire to have any decree against the minor defendant, there must be a finding on the issue whether the said arrangement was made in fraud of the interests of the minor defendant. There must also be findings on the 8th, 9th, 10th and 11th issues.

As to the memoranda of objections, we see no reason to interfere in the matter of costs on which the Subordinate Judge has exercised his discretion.

Findings on the evidence already recorded are to be returned within one month from the date of the receipt of this order and seven days will be allowed for filing objections after the findings have been posted up in this court.

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Abkari Act (Madras), I of 1886 S. 43—*Bail-bond—Enforcement of penalty—Criminal Procedure Code, S, 514—Discretion of Magistrate.*

When, on default of appearance of a person bailed to appear before an Abkari Inspector, he is of opinion that the penalty mentioned in the bail-bond should be enforced and forwards the bond under S. 43 of the Abkari Act to the Magistrate having jurisdiction to try the offence of which the person bailed was accused, the Magistrate is not to be regarded as a mere executing officer but has the same discretion which he would have, if a defaulter had failed to appear before his own court.

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1889 · VI :—*See* SUCCESSION CERTIFICATE ACT.

Admissibility of judgments and decrees not *interpartes—See* EVIDENCE ACT.

Admission.—*By pleader.*

The opinion expressed by a pleader in the course of an argument adversely to a claim which he undertook to advocate is not binding on his client when it is not in accordance with the law applicable to the case.

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Agreement for lease,—*See* STAMP ACT (2).

Agricultural lease— *See* TRANSFER OF PROPERTY ACT (2).

1.—**Appeal**—*Privy Council.*—withdrawal of.

On the application for withdrawal of a minor appellant who has lodged an appeal to the Privy Council in which the printed record has not been transmitted, the High Court has power to order the withdrawal of the appeal when it is satisfied that the compromise leading to the application for withdrawal is beneficial to the minor.

Narainasami Pillai v. *Cuppusami Pillai* 112

2.————— *Provisional decree* in partition suit. See Civil Procedure Code (1)

3.—————Valuation of. See *Valuation of appeal*

B.

Bail-bond—*See* ABKARI ACT.

Bandhus—*See* HINDU LAW (4) and (5).

Caste-head—*Excommunication—Jurisdiction—Validity of order.*

Held, that a provisional order of ex-communication passed by the head of a caste to which the plaintiff belonged for neglecting to visit him, refusing to pay him the customary fee, and associating with excommunicated members of the caste is valid, the order having been passed in the proper exercise of his authority and within his jurisdiction.

Ganapati Bhatta v. *Bharati Swami* 101

Civil Procedure Code§ § 2,540 — Provisional decree — partition suit. An Appeal will lie against a provisional decree in a partition suit Such a decree ought to declare the several rights and liabilities which have been adjudicated upon and embody an order similar to the one contemplated by S. 215 and 215 A. of the Civil Procedure Code.

Krishnasamy Aiyangar v. *Rajagopala Aiyangar* 212

2.————— **S. 13**—*Karnavan and senior anandravan not sued in a representative character—Subsequent suit by other members.*

The decision in a suit by the Karnavan of a tarwad against the Karnavan and senior Anandravan of a branch tarwad not impleaded in a representative character cannot have the force of *res judicata* in a suit instituted by the junior members of the branch tarwad against the plaintiff in the former suit in respect of the same property.

Komappan Nambiar v. *Ukkaran Nambiar* 4

3.————— **S 13** *Res-judicata between Co-defendants.*

Where certain land was claimed by a plantiff against certain defendants as liable to redistribution among them all as Agraharamdars and the first defendant's claim to it as an Inam was negatived, *held* that though the suit having been tried (*ex parte,*) there was no active contest by the defendants, the decision in that suit had the force of *res-judicata* in a subsquent suit between the other Agraharamdars and the former first defendant.

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4.——————— **S. 13**, *See* UNLAWFUL AGREEMENT.

5.——————— **Ss. 25, 223.**—*Transfer of execution—Jurisdiction—Mortgage decree—Execution against property not mortgaged—Share of coparcener not sold.*

Held, that the transfer of a decree passed by a District Court and exceeding in value the jurisdiction of the District Munsif for execution to a District Munsif is valid.

Held also, where a mortgage decree is passed against one of two undivided brothers, directing the sale of family property and execution against the person of the defendant for the balance after deducting the sale proceeds, the decree-holder is entitled to claim execution against property of the defendant other than that mortgaged without first proceeding against the share of the other brother who was no party to the suit, it not appearing that the mortgage debt was binding upon his share.

Shunmuga Pillai v. *Ramanathan Chetti* 91

6.——————— **S. 28**, *See* TRUSTEESHIP, etc.,

7.——————— **Ss. 43, 244** · *See* HINDU LAW (8)

8.——————— **Ss. 206 and 622.**—*High Court's powers in revision—Separate costs—Rule* 37 *of Rules under the Legal Practitioner's Act.*

Where the judgment in a case dismissing the suit did not award separate costs to the defendants, but separate costs were entered in the decree, *held* that the court could correct the error under S. 206 of the Civil Procedure Code. Where, in correcting the error the court directed separate costs to be entered for separate defendants striking out the separate costs in favor of others, *held* that the High Court has power under S. 622 of the Civil Procedure Code, to direct that only one set of costs should be allowed to all the defendants together.

Under Rule 37 of the rules framed by the High Court under the Legal Practitioners Act, to entitle the defendants to separate sets of costs, not only should they set up separate and distinct defences, but they should also succeed on different defences.

Seetharama Pattar v. *Parukutti*... 281

9.——————— **S. 234.**—*Execution of decree—Person in possession not "legal representative."*

A decree cannot be enforced in execution against a person who is not the legal representative of the deceased judgment-debtor on the ground that he is in possession of property belonging to the estate of the deceased.

Chathakelan v. *Govinda Karumiar*... 59

10.——————— **S. 266,**—*Future melvaram—Inalienable shrotriem—Pensions Act XXIII of* 1871, Ss. 4, 11.

Future melvaram rents of an inalienable shrotriem Inam cannot be attached under S 266 of the Civil Procedure Code in execution of a decree against the shrotriemdar, nor can a receiver be appointed to collect such rents for the discharge of the decree.

Rajabadar Naidu v. *Chandrappa Naidu* 13

11.——————— **283,**—*Suit by unsuccessful claimants, See* COURT FEES ACT (8)

12.——————— **Ss. 295, 622.**

Where an application by a rival decree-holder for rateable distribution of sale proceeds under S. 295, Civil Procedure Code, has been allowed: *held*, that the High Court cannot revise the order of the Court below under S. 622, Civil Procedure Code.

Mammod v. *Rama Chund* 87

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13.————————— **S. 317**—*Certified purchaser agent of judgment-debtor—Suit to recover property.*

Where in execution of a decree against the plaintiff's predecessor in interest the jenm right in certain properties was purchased by his agent who became the certified purchaser: *held*, that a suit by the plaintiff against the heir of the certified purchaser is not barred by S. 317 of the Code of Civil Procedure.

Held, however, that the properties were subject to a charge in favor of the heir of the certified purchaser for the amount of the purchase money found to have been paid by him out of his funds with interest thereon at 6 per cent. up to the date of payment.

Obiter dictum:—Section 317 of Act X of 1877 has not altered in principle the rule of law in S. 260 of Act VIII of 1859.

Per Muthusawmi Aiyar, J:—The protection given to a certified purchaser under S. 317 does not extend to cases of fraud.

Per Best, J:—The Judgment-debtor is not entitled to recover property from the certified purchaser on the mere ground that he is a *benamidar*, or that to allow him to keep the property would be to allow a fraud to be perpetrated.

Sankunni Nair v. *Narayanan Nambudri* 64

14.————————— **S. 360**—

A Court other than the District Court invested with insolvency jurisdiction under S. 360 of the Code of Civil Procedure may entertain an application under S. 344 by any person who has been arrested or imprisoned, or against whose property any order of attachment has been made whether in execution of a decree for money passed by that Court, or a decree passed by an appellate Court in confirmation, reversal or modification of the decree of that Court.

Jambuvien v. *Venkatarayar* 28

15.————————— **Ss. 411, 412**.—*Decree on compromise—Order as to Court fee.*

In a pauper suit which is disposed of upon a compromise it is competent to the Court to make an order under Ss. 411 and 412 of the Civil Procedure Code, as to the payment of the Court fee.

Reference under Court Fees Act, S. 5. 98

16.————————— **Ss. 562, 584 and 588, Cl. 28**—*Appeal against remand order—Powers of High Court—Finding of fact.*

Where a court of first instance records evidence on all the issues, and at the final hearing dismisses the suit erroneously on some particular point without deciding the other issues, it is competent to the Appellate Court upon a reversal of the decision of the Court of first instance to remand the case under S. 562.

Ramachandra Joshi v. *Hasi Kassim I. L. R.* 16*M* 207 *followed*

In an appeal against an order of remand, the High Court has no power to disturb the order, if it is a decision on a question of fact.

Venganna Aiyer v. *Ramasami Aiyar* 263

17.————————— **S. 565**, *See* PLEADER'S FEE.

18.————————— **S. 583**—*Restitution.*

Where the mortgagee from one of two rival claimants to a *mutt* brought a suit for the recovery of rent against a tenant of some mutt lands to which the other claimant was made a party-defendant, and the tenant paid the money into Court to be given away to the person found entitled, and the plaintiff obtained the money in consequence of a decision in his favour by the Appellate Court, which however was reversed on second appeal preferred by the rival claimant making the tenant and the plaintiff respondents:

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Held, in an application by the tenant for restitution of the money paid over to the plaintiff, by *Best*, J., that the tenant was not entitled to restitution as there was no decree in his favour but only in favor of the rival claimant: *by Muthusami Aiyar*, J., that the payment by the tenant into Court having been in favor of the rightful claimant, an erroneous order of the Court, directing payment to the wrong party, can only be rectified at the instance of the person rightfully claiming it.

Haji Kasim v. *Jurni Deog* 1

1. **Contract.**—*Assignment—Personal considerations—Rights coupled with liabilities—Res judicata—Suit of a Small cause nature—Similar conditions of appealability.*

Where a contract is entered into with reference to personal considerations, such as the skill, character, credit, or substance of the parties, or where contractual rights are coupled with liabilities: *held*, that rights conferred by the contract cannot be assigned.

Arkansas Valley Smelting Company, v. *Belden Mining Company*, 127. *United states Rep.*, p. 379, *followed.*

In order to constitute a decision *res judicata* for the purpose of barring the trial of a subsequent suit or issue the former decision must be rendered by a Court which is competent not merely to try a subsequent suit, but is also competent to try it subject to similar conditions of appealability. Where accordingly a suit is of a small cause nature and admits only of an appeal but not of a second appeal, a decision in such suit will not bar the trial of a subsequent suit in which a second appeal would lie to the High Court.

Govind Bin Lakshman Shet v. Dhond Barav Bin Gan Barav Tambye I. L. R, 15 B. 104· and *Vaithilinga Padayachi v. Vaithilinga Mudali* I. L. R, 15 M, 111 *followed.*

Namasivaya Gurukal v. *Kadir Ammal* 31

2.—— *Construction of—Shipment at monthly intervals.*

In a contract for the shipment of goods in 6 lots of 20 cases, each at monthly intervals, the phrase 'shipment at monthly intervals' means there should be an interval of one month more or less between one shipment and another, regard being had to the time which it may be reasonable to allow for finding a steamer available.

Volkart Brothers v. *Ruthnavelu Chetti* 179

1.—**Contract Act IX of 1872, Ss. 69 and 70,** *See* CONTRIBUTION, &c.

2.————**S. 74**

A provision for payment of an enhanced rate of interest from the date of the bond on default of payment on the due date is binding on the parties in the absence of surprise, undue advantage, and other similar circumstances.

Narainasamy Naidu v. *Naraina Rao* 71

3.——————**S. 74**—*Enhanced interest from date of bond on default—Reasonable compensation—Interest post diem.*

Where a mortgage-bond stipulated for payment of the principal with interest at 21 per cent. per annum on a certain date and on default of payment on such date, provided that interest shall be paid at 36 per cent. per annum from the date of the bond, *held* (1) that the document must be construed as providing for interest beyond the due date also, and up to the date of payment, and (2) that a stipulation for payment of interest at an enhanced rate on default from the date of the bond is penal and reasonable compensation only can be awarded

Per Muthusami Aiyar, J.—Even though the enhanced rate payable on default runs from the date of the bond, it may be awarded in some cases as reasonable compensation.

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Gopaludu v. *Vencataratnam* 257

4 ——————S. 74, alternative obligation—*See* STAMP ACT (1).

Contribution for repair by co-owner against another *Indian Contract Act Ss.* 69 *and* 70.

Where the Government and Zemindar are co-owners of a tank the water of which irrigates ryotwary villages of Government and the villages of the Zemindary, and necessary repairs are done to the tank by Government without the request of the Zemindar, *held* that as the repair was lawful and done for the benefit of the Zemindar also, the Government not intending to do so gratuitously and as the Zemindar had benefited by the repair, the Government was entitled to claim contribution for the expenses incurred for the repair with reference to the relative irrigated areas of the Government and Zemindary villages under S. 70 of the Contract Act.

Damodara Mudaliar v. *The Secretary of State* 206

1.—**Costs**—general rule See Limitation (5).

2.———separate sets. See Civil Pro. Code (8).

1. **Court Fees Act VII of 1870, S. 7**—Cl. IV, *(b) and (c)—Suit for partition of property in joint possession—Stamp duty on.*

A suit for partition by one claiming to be in joint possession with defendant of the property in suit is similar to one for partition of joint family property and chargeable with an *ad valorem* fee.

Reference under Court Fees Act, S. 5 110

2.——————————, **S. 7**—Cl. (IV) *(f) Court-fee, Memorandum of Appeal from decree reserving determination of amount for execution.*

Where a decree directed the defendants to pay the plaintiff for certain Fuslis before suit at 2½ per cent on the gross revenue of a Zamindary and reserved the determination of the actual amount for execution; *held*, in an appeal by the defendant from this decree that the appeal was capable of being valued and that the appellant should value it under section 7. Cl. (4) *(f)* of the Court Fees Act.

Reference under Court Fees Act Section 7 22

3.——————————, S. **12**—*Suit by unsuccessful claimant under S. 283, Civil Procedure Code-Court-fee.*

Property was sold in execution of a decree and the plaintiff's claim having been disallowed, she brought a suit to establish her title to the property and paid a court-fee in the court of first instance, computed on the amount of the court sale. The suit having been dismissed, she preferred an appeal paying the court-fee as in the first court. The District Judge called upon the appellant to pay the court-fee upon the amount of the decree in execution of which the property was sold. On the appellant making default the appeal was dismissed:

Held by the Full Bench in second appeal the question raised being one as to the category in which the suit was to be placed for the purpose of determining the court-fee, a second appeal lay notwithstanding S. 12 of the Court Fees Act.

Held by the Divisional Bench that the court-fee was not to be computed on the amount of the decree in execution of which the property was sold and that the amount paid in the first court was sufficient whether the court-fee was to be calculated on the view that the suit was for two declarations, namely, that the plaintiff's sale was valid and that the court sale in favor of defendants was invalid or on the view that the suit was for setting aside a court sale in which case the court-fee should not exceed that on the value of the property attached and sold under Sub S. viii—*S.* 7 of the Court Fees Act.

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Lakshmi Amma v. *Janamajayan Nambiyar* 183

4.———————————— *Valuation of appeal costs in lower court—Subject matter of dispute in appeal.*

When apart from and independently of any other reliefs which an appellant seeks in an appeal from a decree, he seeks relief on the ground that the costs of the proceedings terminating in the decree have not been properly assessed or apportioned by the decree, he makes the costs the subject matter of dispute and must pay stamp duty thereon.

Reference under Court-Fees Act, S 5 118

1. **Criminal Procedure Code, S. 195**, *See* Registration Act (1).

2.————————, **S. 488**—*Husband's adultery—Wife's refusal to live—Offer to maintain.*

The term "adultery" in S. 488 of the Criminal Procedure Code must be understood in the sense given to it in S. 497 of the Indian Penal Code.

A wife is not entitled to refuse to live with her husband and claim maintenance merely because the husband keeps a concubine.

The husband's offer to maintain, which disentitles the wife to claim separate maintenance, must be an offer to maintain with the consideration due to her position as wife.

Per Muthusami Aiyar, J.—The husband's immorality which does not amount to adultery or involve the degradation of a married woman being brought into the society of a concubine is not sufficient ground for the wife's refusal to live with her husband.

Queen Empress v. *Mannatha Achari* 83

3.————————, **S. 514**, *See* Abkari Act.

4.————————, **S. 532**, *See* Magistrate, etc., (1)

Customary right—*Easement—Diversion by the Upper proprietor—Unreasonableness of custom—Natural stream—Riparian rights—Extraordinary uses.*

A natural stream in the Sivagunga Zemindari fed a number of tanks through supply channels one of which supplied the defendants' villages and another a village lower down the stream. The plaintiffs the lessees of the Zemindari sued for the removal of a dam put up by the defendants, across the stream to divert their water into their supply channel diminishing thereby the water available for the tank T.

Held (1) that in the absence of an easement of customary right to the contrary, the defendants would not have the right to put up the dam so as to diminish the supply avilable to the plaintiffs. *Swindon Water Works Co.,* v. *Wilts and Berks Canal Navigation Co.,* L. R. 7 H. L, 697 followed (2) that such a right of the nature of an easement could be acquired by custom and the defendants in the case had so acquired it (3) that such a custom cannot be deemed to be un-reasonable and (4) that the defendants as lessees of one of the villages of the Zemindari were not incapable of acquiring such rights as against the plaintiffs as the subsequent lessees of the Zemindari.

Per cur—A natural stream is one which has a natural source and flows in a natural channel.

R. *G. Orr.* v. *Raman Chetty* 248

Easement.—*As customary right* —See "Customary right."

Estoppel.—*Representative—Hindu widow—Adverse possession—Extinction of right.*

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Where a grant of land was made by the appellant's paternal grandfather to the appellant's adoptive maternal grandfather and resumed on the death of the latter on the ground that the grant was a conditional one, and the appellant claimed to recover the land as representative of his maternal grandfather.

Held that the appellant could not be estopped from questioning the subsequent grant made by his paternal grandfather to the defendant, as the doctrine of estoppel cannot apply when the person making a representation, is not the one by whose representative as such the claim is made.

Rajah of Bobbili v. *Bhavayammi* 192

Evidence.—*Admissibility of secondary evidence*

1.—Where the original of a document which is not produced was insufficiently stamped, secondary evidence is not admissible of its contents.

Rajah of Bobbili v *Bhavayammi* 192

2.———admission of unregistered lease to prove contract. See Reg. Act. 2

Evidence Act I of 1872 S 35, *Admissibility of Judgments and decrees not interpartes.*

Former judgments and decrees not *inter partes* are relevant under S. 35 of the Evidence Act for the purpose of proving a statement made by a predecessor in title of the party against whom they are sought to be used.

Subramanyan v. *Paramesvaran*, I. L. R, 11 M, 116 and *Gujju Lall* v. *Fatteh Lall*, I. L. R, 6 C, 171, distinguished.

Krishnasamy Aiyangar v. *Rajagopala Aiyangar* 212

Excommunication, *See* Caste-head.

Execution of Decree, *See* Civil Procedure.Code (8).

Foreign judgment—*Jurisdiction—International law—Cause of action—Territorial jurisdiction—Judgment of Court in Native States.*

Territorial jurisdiction attaches upon all persons either permanently or temporarily resident within the territory while they are within it. It exists also as to land within the territory; and it may be exercised as to moveables within the territory; and in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled within the territory. In a personal action to which none of these causes of jurisdiction apply, a decree pronounced *ex parte* by a foreign court to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. Judgments of the Courts of Native States having independent civil, criminal and fiscal jurisdiction must be regarded as foreign judgments and suits can be brought upon them in British Courts.

Sirdar Gurdyal Singh v. *Rajah of Faridkote* ... 267

Fraud—*Lapse of time—Knowledge of fraud.*

When the plaintiff seeks to recover a Zamindari on the ground that by the fraud of the defendant's predecessor in title in 1802 the Sunnud which should have been conferred on the plaintiff's predecessor had been granted to the former, the plaintiff has no subsisting cause of action as the alleged fraud must have been known to the plaintiff's predecessor in interest since that date.

Bala Gowri Vallabha Tevar v. *Periasami* 139

Guardian—*Omission to describe.*

When it is clear from the proceedings in a suit instituted under Act VIII of 1859 that the mother of a minor was impleaded as a defendant in order that she might act as his guardian, but she was not described as his guardian, *held* that the minor was substantially represented and the decree was binding on him,

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Subramanya Pandya Chokka Talvar v. *Siva Subramanya Pillai* ... 152

High Court *Powers of—See* CIVIL PROCEDURE CODE (16).
—*See* POWER (1).

1. **Hindu Law**.—*Adoption of an only son—Suit by remote reversioner to set aside an adoption by the widow—Collusion of prior reversioners—Consent to adoption—Estoppel*

One who is not the nearest reversioner on the death of a Hindu widow is entitled to sue for a declaration that an adoption made by her is invalid where the nearer reversioners are in collusion with the widow, or have concurred in the adoption, or refused to institute proceedings to set it aside, or precluded themselves from suing

Held further that the mere consent of the plaintiff's reversioner cannot estop him from seeking a declaration that it is invalid

Held also that under the Hindu Law and on the principle of *stare decisis* an adoption of an only son is not invalid.

Per Muthusamy Aiyar J. Obiter. A Hindu widow may give an only son in adoption without special authority from her husband.

Narayansami v *Kuppusami*, I.L.R. 11 M, 43 and 489 followed.
Guralingaswamy v. *Ramalakshmamma*. 237

2.——————*Alienation by will by widow with reversioner's consent—Validity of—Disqualification for Succession—Insanity not congenital*

A testamentary disposition by a widow with the consent of the next reversioner cannot confer a title to the estate on the devisee.

Obiter dictum:—Where a Hindu father dies leaving ancestral property and a son insane at the time of his death, the son is not entitled to take the property. Insanity need not be congenital to disqualify a person for inheritance.

Raghava Mudaliar v. *Narayanasami Mudaliar*. . .. 89

3.——————*Impartible Zemindari—Succession—Half-brother. See Limitation Act* (1)

4 ——————*Inheritance—Daughter's daughter—Bandhus.*

A daughter's daughter is a *bandhu* and can succeed in the absence of preferential male heirs.

Ramappa Udayan v. *Armugath Udayan*. 30

5.——————*Inheritance—Sister's daughter—Mother's sister's daughter—Paternal uncle's daughter's son—Bandhus—Preferential heir—*
The sister's daughter is not a bandhu and if entitled to inherit as a relative, can come in only after bandhus. The paternal uncle's daughter's son being a bandhu *ex parte paterna* is a preferential heir to the mother's sister's son who is only a bandhu *ex parte materna*.

Soundaraammal v. *Rungasami Mudaliar*. 275

6.——————*Joint family—Sale by one member.*

According to the Mitakshara law administered in the Madras Presidency, a sale by a Hindu co-parcener of his undivided interest in the family property is clearly valid and gives the vendee a right to claim the share of his vendor though not any specific property.

Where a Hindu coparcener under the Mitakshara law sells his undivided interest in joint family property and a surplus is left after payment of his debts from the sale proceeds and the same is retained by him, or by some one else in trust for him, or laid out in the acquisition of other property, the character of co-parcenary property and the incident of survivorship attach to the surplus so retained, or to the property into which it has been converted.

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In the absence of a valid special agreement, the managing co-parcener of a joint Hindu family is not entitled to any special remuneration for management

Krishnaswamy Iyengar v. *Rajagopala Iyengar* 212

7.————:—*Personal decree against widow—Purchaser taking life interest—Effect of dismissal of claim petition by reversioner.*

Where a merely personal decree was passed against a widow though for a debt binding on the reversioner and there is nothing to show that the decree was intended to operate against the reversioner the purchaser of the property in excution of the decree takes only the widow's life interest.

Narana Maiya v *Vesteva Karanta* 63

8 ————*Son's liability to pay father's debts—Decree against father—suit against son after father's death—Civil Procedure Code Ss. 43, 244—Limitation Act XV of 1877, Sch. II, Art. 120—Nonjoinder of Plaintiffs.*

Where a money decree payable by instalments had been obtained against a Hindu father and two of his sons and an application for execution on the father's death against two other sons born after the decree had been dismissed, *held*, (1) that a suit by the creditor for the recovery of the instalments then due from the ancestral property in the hands of the latter is not barred by S. 244 or S. 43 of the Code of Civil Procedure, or by any other rule of law *Arunachala* v. *Zamindar of Sivagiri, I.L.R.* 7 *M*, 328, *Natesayyan V. Ponnusami, I.L.R.* 16 *M*, 99, *Hanumantha V Hanumayya, I.L.R.* 5 *M*, 232 followed (2) that the suit was not for mere declaration under S. 283 in respect of instalments already due, but for their recovery, the order refusing execution against the sons having been passed under S. 244 of the Code. (3) that the suit was not barred by limitation as Art. 120 of the Limitation Act applied and the time began to run in respect of instalments that became due after the father's death from the dates on which they fell due: *Natesayyan* v. *Ponnusami*, I.L.R, 16 M. 99 distinguished; (4) that the plaintiff was only entitled to a declaration in respect of instalments which had not become due at the date of suit; (5) that the non-joinder of the plaintiff's undivided brother was only an immaterial irregularity by reason of the amendment made in the plaint by which the plaintiff was described as the managing co-parcener and representative of his joint family

Ramayya v. *Venkataratnam.* 52

Inam lands, *Suit for possession of, See* REGULATION (3).

Indian Ports Act of 1889 *Ss.* 61, 8—*Rules framed under the Act and disobedience of orders of port conservator—Ultra vires—Delegation of power to make rules.*

The acused having been convicted under S. 8 of the Indian Ports Act of the offence of disobedience to the lawful order of the conservator of the Negapatam Port to the effect that boats should not be brought in while the flag W, was flying · *held* that the order of the conservator was not a lawful direction given for the purpose of carrying into effect any valid rule passed under the Act

Held also that the Rules had no bearing upon the case and that rules which were framed under section 8 Cl. (k) of the Act should be so construed as not to be in excess of the powers conferred by the said clause which was not intended to regulate the entry or exit of vessels in the matter of time.

Held further, that the charge could not be maintained as it was based on an alleged breach not of rule VIII itself, but of a direction given by the conservator in pursuance of an authority conferred on him by rule VIII and the Local Government had acted *ultra vires* in empowering him to make rules.

1. **Legal Practitioner's Act. XVIII of 1879** Rules, 31, 35. See Pleaders fee.

2.——————————, Rule 37 of Rules under the, See Civil Procedure Code (8).

1. **Limitation**; See Interest, *post diem* (1)

2.————————, See Revenue Recovery Act (1) & (2)

1. **Limitation Act, XIV of 1859.**

When a widow is deprived of property inherited from her husband on the ground that her husband's right to it was conditional, the deprivation is adverse both to the widow and to her reversioners under Act XIV, of 1859, and if twelve years elapsed after the dispossession before Act IX of 1871 came into force, the right of the reversioners would be extinguished and could not be revised by Act IX of 1871.

Rajah of Bobbili v. *Bhavayammi* 192

2.——————*Alienation by guardian.*

Where the mother of a minor alienated certain property as his guardian in 1861 and succeeded to him on his death and a suit was brought for the recovery of that property in 1891 after her death in 1890 *held* that the suit was barred by limitation.

Soundrammal v. *Rangasami Mudaliar* 275

1 **Limitation Act XV of 1877**, S 7 Illus. (*b*), Art 45.—*Transfer of minor's rights—Hindu law—Impartible Zamindari—Succession—Survivorship—Half-brother's rights—Minor—Substantial representation—Act VIII of* 1859.

Where the period prescribed for a suit by the Limitation Act is less than 3 years, S. 7 of the Act or illustration (*b*) does not give a minor 3 years after attaining majority to institute the suit, but only the period prescribed in the schedule computed from the date of attainment of majority. The intention of the section is to give the full period 3 years after majority only when the period prescribed extends to 3 years or more and expires within 3 years from the date of majority.

Quaere. Whether the privilege conferred by S. 7 is personal to the minor or extends to adult transferees of the minor *Mahommed Hossein* v *Purandur Mahto*, I. L. R. 11 C. 287, and *Suryana* v. *Durgi*, I. L. R, 7 M, 258 referred to

Article 45 of sch. II does not apply to suits to set aside a Court sale in execution of a decree obtained against a minor represented by his guardian.

In the case of impartible coparcenary property under the Mitakshara, a brother of the half blood, who is senior in age, succeeds in preference to a junior uterine-brother.

Per cur. (1) The rule of decision in regard to succession to impartible property is to be found in the Mitakshara law applicable to partible property subject to such modifications as naturally flow from the character of the property as an impartible estate.

(2) The only modification which impartibility suggests in regard to the right of succession is the existence of a special rule for the selection of a single heir when there are several heirs of the same class who would be entitled if it were partible. (3) In the absence of a special custom the rule of primogeniture furnishes a ground of preference.

(4) Nearness of blood is not a ground of preference with reference either to partible or to impartible property, as the principle of survivorship is the dominant one in such cases.

Katama Natchiar v *The Zamindari of Shivaganga*, 9 M. I. A. 539, *Naraganti Achamma* v *Venkatachelapati*, I. L R. 4 M. 150, *Jogendra. Bhupati* v. *Nityanand*, L R. 17, I. A. 128 relied on and followed. *Neelkisto* v. *Beerchunder*, 12 M. I. A 523, *Sartaj Kuari* v. *Deoraj Kuari*, L. R 15 I. A. 51, *explained and distinguished.*

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Subramanga Pandia Chokka Talavar v. *Siva Subramanya Pillai*. . 152

2.——————————, S. 8—See Revenue Recovery Act (1)

3.——————————, S. 10—*Alienation by head of a Mutt—Suit by a successor—Permanent occupancy by alienee.*

Where properties had been granted for the support of a Mutt and for other religious purposes and by the usage of the institution, the descendants of the grantee were also maintained out of its income, *held* that an absolute alienation by the head of the Mutt to his brother of some of the properties in lieu of maintenance was invalid and would only be upheld during the lifetime of the brother and of the members of his family. *Held* also that the possession by the alienee of the properties for a long period and the granting of patta to him cannot confer a right of permanent occupancy upon him.

Where such alienation was made in 1842 by the then head of the Mutt and a suit is brought by his successor in 1886 for the recovery of the properties for the Mutt from the widow of the alienee, *held*, that the suit is not barred as it falls within S. 10 of Act XV of 1877.

Sathianama Barathi v. *Saravanabagiammal* 224

——————————, S. 22, See unlawful agreement.

4.——————————S. 27. *See* Joinder of parties (1).

5.——————————Sch. II, Art 85—*Mutual account.*

An account is mutual within the meaning of Art 85 of the Limitation Act when there are transactions on each side creating independent obligation on the other, and not merely transactions which create obligations on the one side, those on the other side being merely complete or partial discharges of such obligations.

To constitute an account mutual, it is not necessary that there should be a shifting balance from time to time, but it is a possible and likely incident of mutual transactions.

The general rule as to costs is where a plaintiff recovers a less amount than he claimed in the plaint, they should be apportioned to the sum recovered and not to the sum claimed

Velu Pillai v. *Ghose Mahomed.* 140

6.——————————, II, Art 110—*Suit for rent—Arrears due from date of judgment amending patta..*

The landlord tendered a patta within the fasli to which the patta related but the tenant refused to accept it. He then brought a summary suit to enforce acceptance of patta which was finally decided by the District Judge on appeal amending the patta and directing its acceptance. In a suit for rent due for the fasli, instituted by the landlord the defendant pleaded limitation, more than three years having elapsed from the end of the fasli.

Held.—that the suit was not barred as the arrears became due, under Art 110, Sch. II of the Limitation Act, only on the date of the judgment of the District Judge amending the patta and not at the end of the fasli.

Sobhanadri Appa Row v. *Chellamanna.* 5

7.——————————, Sch. II Art 120—See Hindu Law, (8)

8.——————————, Sch. II Art 123, 127

Where 6 divided branches of a Malabar Tarward and a seventh divided branch sued for their shares of the property which had belonged to an eighth branch which became extinct, *held* that the suit was one for a distributive share of the property of an intestate and that Art 123 and not Art. 127 of Sch. II of the Limitation Act applied to the suit.

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Ammu v. *Kunhunni Menon* 31

9.————————————, Sch. II, Art 179—*Application against deceased judgment-debtor in accordance with law.*

Held, an application for execution which by mistake specified the name of one of many joint judgment debtors who was dead at the time of the application as the person against whom execution was sought was an application in accordance with law within the meaning of Act 179 of Sch. II of the Limitation Act.

Sami Pillai v. *Chockalinga Chettiar.* 8

Magistrate, *without territorial jurisdiction committing—Quashing commitment—Criminal Procedure Code*, S. 532.

Where a Magistrate having authority to commit but not having territorial jurisdiction in respect of the offence commits a case to the proper Sessions Court, the commitment cannot be quashed under S. 532, Criminal Procedure Code.

Queen Empress v. *Abbi Reddi* 196

2.————————— *discretion of—See* ABKARI ACT.

Mahomedan Law, *Shiahs—Marriage with a Burmese woman—Presumption as to marriage—Acknowledgment as to sonship.*

To constitute sonship the acknowledgment must not only be of parentage but also of legitimacy. (*Ashrufood Dowlah Ahmed Hossein Khan* v. *Hyder Hossin Khan*, 11 M. I A., 113) referred to.

Their Lordships declined to examine and discuss the tenets of Budhism in order to ascertain that the Budhist came under the same category as Jews and Christians with whom undoubtedly a Mahomedan may intermarry as it was a common ground of the parties in the courts below that such a marriage was invalid.

Abdool Razack v. *Aga Mahomed Jaffer* 132

1. **Malabar Law**—*Moplas—Marumakkathayam.*

Held, in second appeal, that that the evidence in the case did not justify the inference of a custom among Marumakkathavam Moplas families in North Malabar according to which devolution of self-acquired property was said to be governed by the ordinary Mahomedan law.

Illikka Pakrammar v. *Kutti Kunhamed* 15

2.——————*Ottidar's right of pre-emption—Property sold by court auction with notice to ottidar.—Waiver.*

Where property subject to an *otti* is sold under a court sale by the plaintiff, *held*, that the ottidar who was a party to the suit in which the sale was held did not waive his right of pre-emption by mere notice of the date of sale. *Cheria Krishnan v. Vishnu, I. L. R.* 5 M 198 *followed, &* *Ammoti Haji* v. *Kunhayen Kutti I. L. R.* 15 M, 480 distinguished.

Kannran Nair v. *Raman Numbiar* 46

Malikana, *See* PENSIONS ACT (1)

Marriage, *presumption See* MAHOMEDAN LAW.

Merger of cause of action in decree :—*See* RES JUDICATA (2).

Minor's rights—Transfer of, *See* LIMITATION ACT (1).

Misjoinder—*Causes of Action.* *See* Valuation for appeal.

Mortgage—*Rights of first and second mortgagees—Redemption—Sale—Interst—Penalty.*

Where property is purchased by a prior mortgagee in execution of a decree upon his prior mortgage, a subsequent mortgagee, has not merely a right to redeem the prior mortgage but can also bring a suit against him for sale of the mortgaged property.

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A provision for payment of an enhanced rate of interest from the date of the bond on default of payment on the due date is binding on the parties in the absence of surprise, undue advantage, and other similar circumstances.

Narainaswmy Naidu v. *Naraina Rao* 71

2.——— ———Decree for redemption- second suit—Res Judicata. See Res Judicata (2).

Mortgage decree—*Sale in execution —Charge in favor of decree-holder for subsequent arrears of revenue paid—Liability of property sold for fresh charge.*

An agraharam which consisted of several shares belonged to a number of agraharamdars and was registered in the name of them. Plaintiff as the mortgagee of 38 out of 51 shares from some of the agraharamdars obtained a decree on the mortgage. Before the sale, plaintiff paid the arrears of revenue that accrued subsequently and afterwards sold the shares in execution of the mortgage decree. He now sued for the recovery of the amount of revenue paid by him with interest from the whole of the agraharamdhars and the entire 51 shares :—

Held (1) that the plaintiff was entitled to a decree against the unregistered as well as the registered proprietors; (2) that the 39 pangus having been sold subject to the charge in plaintiff's favor, he was entitled to a decree against them also; (3) that the plaintiff was entitled to a joint and several decree against all the agraharamdhars.

Sreenivasa Thathachar v. *Rama Aiyan* 73

———*See* Civil Procedure Code (4)

Mortgage instrument—*Covenant to pay.—What amounts to* :—

Where a usufructuary mortgage instrument provides, *inter alia* "I shall pay you the said mortgage amount in Chittrai, 1883" *held*, that there is a personal covenant to pay

Sivakami Ammal v. *Gopal Sarundram Aiyan* 50

Mutt, *alienation by head of a, See* Limitation Act (3).

Negotiable Instruments Act XXVI of 1881, S 46—*See* Promissory Note (1)

Non-registration—Action for damages, *See* Registration Act (2).

1. **Pensions Act XXIII of 1871, S. 4**—*Jurisdiction of Civil Courts —Malikana.*

Where an owner of property makes over his proprietary rights to Government in consideration of receiving a sum of money per annum as Malikhana in perpetuity, the grant of money is one which comes within the words of S. 4 of the Pensions Act and the Jurisdiction of the Civil Courts is excluded.

Deo Kuar v. *Man Kuar* 272

2.——— **S. 4, 11,**—*See Civil Procedure Code* (10).

Pleader's fee—*Declaratory suit—Legal Practitioner's Act XVIII of* 1879, *Rules* 31,—35—*Powers of Appellate Court—Civil Procedure Code, S.* 565.

For the purposes of computing pleader's fees, a declaratory suit falls under Rule 35 of the Rules framed under the Legal Practitioner's Act and not under Rule 31. In such cases the court ought to fix a reasonable fee having regard to the time occupied in the preparation and hearing of the case and the nature of the questions raised therein. The Lower Court having failed to do so, the High Court exercised its discretion and fixed a reasonable fee under the provisions of S. 565 of the Civil Procedure Code.

Govinda Charlu v. *Krishna Row* 18

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Power of High Court to allow withdrawal of appeal to Privy Council.

On the application of a minor appellant who has lodged an appeal to the Privy Council in which the printed record has not been transmitted, the High Court has power to order the withdrawal of the appeal when it is satisfied that the compromise leading to the application for withdrawal is beneficial to the minor.

Narainasami Pillai v. *Cuppusami Pillai* 11

2.——————— Power to make laws—delegation of—invalid See INDIAN PORTS ACTS OF 1889.

1. Promissory note—*Endorsement invalid—Negotiable Instruments Act XXVI of* 1881 *S* 46.

Held, that although the property in a promissory note payable to order on demand passes by endorsement and delivery, a suit by the endorsee having been dismissed on the ground that the endorsement was invalid, the endorsement must be treated as cancelled and the payee entitled to sue.

Held also, that the payee of a promissory note is entitled to pay an endorsee when the note is dishonoured and striking out the endorsement, to sue the maker for compensation, and that as the endorsee had been paid after dishonor, the suit upon the note by the payee would lie.

Marimuthu Pillai v. *Krishnasami Chetti* 60

Practice.—*Fresh issue.*

Where the parties to a suit have gone to trial upon a specific case, an appellate court is not at liberty to raise a new issue upon a question of mixed law and fact not suggested in the pleadings.

Illikka Pakrammar v. *Kutti Kunhamad* 15

2.——————*Partnership—Suit against non-executant partners*

Where a promissory note is signed by a partner of a firm, but he does not sign the name of the firm or describe himself as a mere agent of the firm or the other partners, no suit can be maintained upon the promissory note against the partners who have not joined in the execution of the promissory note, even though the promissory note is given for partnership purposes. In such cases a suit may be maintained against the partnership upon the consideration of the promissory note.

Bassi Reddi v. *Tamanna* 77

Presidency Small Cause Court Act XV of 1882, S. 22—See Transfer of Property Act (4)

Registration Act III of 1877, Ss 34, 35—*Criminal Procedure Code, S.* 195—*Sub-Registrar—Sanction—Court.*

A Sub-Registrar acting under Ss. 34 and 35 of the Indian Registration Act III of 1877 is not a court within the meaning of S. 195 of the Criminal Procedure Code and his sanction is not therefore necessary for a prosecution for false personation or abetment of false personation with reference to a document registered by him under those sections.

Atchayya v. *Gangayya*, I. L R., 15 M, 138, and *In re Venkatachala*, I. L. R., 10 M, 154, distinguished.

Queen Empress v. *Subba* I. L. R., 11, M, 3, and *Queen Empress* v. *Sobhanadri* I. L R. 12 M, 201 followed.

Queen Empress v. *Ramaya Nadan* 189

2.——————————, **S. 49**—*Unregistered lease for five years—Admissibility of—Action for damages for non-registration.*

S. 3 of Regulation VI of 1831 and is excluded from the ju[...]tion of the Civil Court

Palamalai Padayachi. v. Shanmuga Asari . ...

Regulation VII of 1817. *See Religious Endowments Act.*

Religious endowments Act XX of 1863—*Appointme[nt] additional Trustees by a Mahomedan committee—Illegality [...] gulation VII of* 1817.

The committee under Act XX of 1863 is competent when there [...] hereditary trustee of the mosque to add to the number of the [...]ing trustees and has the same powers as were possessed by the [...] of Revenue under Regulation VII of 1817, but the power bei[ng dis]cretionary should be excercised reasonably and in good faith [...] its improper exercise is capable of being controlled by a Co[urt of] Justice.

David Saiba v. Hussein Saiba . . ..

Rent Recovery Act (Madras) VIII of 1865, S. 10—[...] *enforce acceptance of patta, the Revenue Court is bound to [...] questions of title raised by the defendants.*

Narayanachariar v. Ranga Ayyangar I. L. R., 15 M, 223 and *Ay[...] v. Venkatakrishnama rasu, I L. R. 15 M, 485 followed.*

Per cur: Whenever a court is invested with jurisdiction to [deter]mine the existence of a particular legal relation, the intention [...] be taken to be to authorize it to adjudicate on every matter [...] or of law incidental to such adjudication.

Rahiman Sahib v. Anna Pillai.

———————————, *See Res judicata* (1)

Res. judicata—*Decision of Revenue Court on title—Rent Rec[overy] Act VIII of* 1865 **S. 10.**

In a suit for the recovery of property from which the plainti[ff had] been ejected under an order of ejectment under section 10 [of the] Rent Recovery Act passed in purusuance of a decision comp[elling] the acceptance of a patta by a Revenue Court, *held* that the [plain]tiff's title to recover was not barred by the decision o[f the] Revenue Court.

Rama v. *Tirthasami I. L. R. 7 M.* 61 *followed.*

Ragava v. *Rajagopal I. L. R.* 9 *M.* 89 *disapproved.*

Ganga Raju v. *Kondreddiswami.* . . ..

————, *Second suit for redemption—Merger of cause of [action] in decree.*

Where a decree for redemption directed that on plaintiff's failr[ure to] pay within a certain time the right to redeem should be barr[ed, a] second suit for redemption after the lapse of the period spe[cified] does not lie.

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Ramasmi Thevan v. *Sami Aiyan* 29

3.————————

The dismissal of a claim petition by the reversioner in execution proceedings against the widow cannot affect his reversionary right.

Narana Maiya v. *Vasteva Karanta* 63

4.————, *See* CONTRACT (1)

5.————, *See* UNLAWFUL AGREEMENT.

6.————————, *between co-defendants, see* CIVIL PROCEDURE CODE (8).

Restitution:—*See Civil Procedure Code* (18).

Revenue Recovery Act II of 1864, S. 59.—*Suit to set aside revenue sale for fraud—Limitation—Limitation Act XV of* 1877 *S.* 8.

A suit to set aside a revenue sale under Act II of 1864, on the ground that there was no notice as provided by the Act and that there was fraud on the part of the Village Munsif who bought part of the property cannot be instituted more than six months after the cause of action arose

Nilankandan v. *Thandamma* I. L. R., 9 M, 460 distinguished; *Venkata* v. *Chengadu*; I. L. R., 12 M, 168 followed.

Where one of several persons jointly interested in setting aside a sale is a minor, S. 8 of the Limitation Act does not operate to delay the commencement of the period of limitation.

Seshan v. *Rajagopala* I. L. R., 13 M, 236, and *Vigneswara* v. *Bapayya* I. L. R., 16 M, 436 followed

Narayanan Nambudri v. *Damodaran Nambudri* 80

————————, **S. 59** —*Limitation—Setting aside revenue sale—Illegality and irregularity.*

There is no distinction between an illegal and irregular revenue sale in regard to the period of limitation for setting it aside.

Even a sale which contravenes some express provision prohibiting such sale must be sought to be set aside within six months.

Rajah Gounden v. *Raja Gounden* 86

Reversioner —*Effect of dismissal of claim petition by—See Hindu law* (4)

1. **Specific performance**—*Agreement to divide.* *See* Trusteeship.

2. ————————*Minor—Contract by Hindu father—Specific Relief Act I of* 1877, *Ss.* 21 (*e*), 28 (*a*)—*Principle of mutuality.*

Where a Hindu father contracts to sell family lands for debts which are not immoral and dies pending a suit instituted against him for specific performance of the contract for sale and his minor sons are brought on the record as his representatives:

Held, that the plaintiff is entitled to specific performance against the minor representatives, and that, where a sale by a father would be binding on his minor sons, an agreement to sell would be equally binding and specifically enforceable.

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A sale by some of the members of an undivided Hindu family to another of them of their rights as joint trustees of a charity and of their share in family property for one entire sum is valid to the extent of the family property and the purchaser is entitled to a decree for it, if he does not claim an apportionment of the consideration. A completed agreement to effect a partition of family property in certain ways can be the basis of a suit for specific performance and the Court may pass a decree directing a deed of partition to be executed, though as part of the agreement, it was intended by the parties that a deed of partition should be drawn up but was not.

Held also that in a suit for specific performance upon an agreement of partition entered into by the plaintiff and the first defendant, the son of the first defendant may be impleaded as a defendant under 28 C. P. C. though no specific performance can be claimed against him, he not having been a party to the agreement and the relief prayed for against him was merely a declaration that the agreement was binding upon him.

Alagayya v. *Sivarama Sundara* 288

Unlawful agreement—*Stifling prosecution—Res judicata—Civil Procedure Code*, S. 13—*Similar conditions of appealability—Limitation Act* XV of 1877, S. 22—*Transposition of defendant as plaintiff*—Specific Relief Act I of 1877, S. 42—*Suit to declare agreement invalid—Suit by one of several executants to set aside an agreement.*

An agreement part of the consideration for which is the abandonment of a non-compoundable criminal charge is contrary to public policy and therefore illegal, and void.

A decision by an appellate court in a suit of a small cause nature in respect of which there is no second appeal, cannot operate as *Res judicata* to prevent the trial of a subsequent suit in which a second appeal whould be competent.

Where parties who are defendants are subsequently transposed as plaintiffs, they must be deemed to be added as plaintiffs within the meaning of S. 22 of the Limitation Act and the suit should as regards them be deemed to have commenced only from the date of such transposition.

No suit will lie under S. 242 of the Specific Relief Act for a mere declaration that a certain instrument is invalid.

Where an agreement is executed by several parties any one of them may sue to set aside the agreement and relieve himself from liability.

Srirangachariar v. *Rangasami Aiyangar* 106

Ultra vires—*See* Inam lands.

Unregistered lease for five years, *See* REGISTRATION ACT (2).

Usufructuary mortgage, *See* TRANSFER OF PROPERTY ACT (1).

Valuation for appeal. Variation between plaint and decree—Limitation Act XV of 1877 Sch II, Arts 123, 127—Suit for partition—Misjoinder—Liability of heirs of Karnavan—Receipt of assets. Where the plaint in a suit in the Subordinate Court was valued at less than 5,000 Rs., but the decree was for a sum exceeding 5,000 Rs. as due at the date of suit, *held*, that the value of the suit for purposes of appeal must be taken as equal to the amount of the decree and that the appeal lay to the High Court.

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Where the usufructuary mortgagee is entitled to the usufruct in lieu of interest at 10 per cent per annum, damages amounting to interest at 10 per cent may also be charged on the property in a decree for the money.

A prior mortgagee who takes subsequent to the usufructuary mortgage a fresh mortgage bond including the amount of prior mortgages, does not thereby lose his priority.

Linga Reddi v. *Sama Row* 143

2.———————— ——**108** (*e.*) and **S. 117**,

117—*Agricultural lease—Destruction by fire—Lease void.*

Held, that a lease of a coffee garden is not an agricultural lease under S. 117 of the Transfer of Property Act. Where there was a lease of coffee plants and they were destroyed by fire, the lease becomes void under 108 (e.) of the Transfer of Property Act.

Kunhayen Haji v. *Mayan* 21

3.——————————————, **S. 114**—*Payment into Court—Relief against forfeiture—Presidency Small Cause Courts Act XV of* 1882 *S.* 22—*Costs between attorney and client.*

Held, that a lessee is entitled to be relieved against a forfeiture clause in the lease where in a suit for the recovery of property by the lessor as upon a forfeiture the lessee pays into court the arrears of rent with interest and costs, and that the further conduct of the suit after the payment is at the risk of the plaintiff.

An application under Cl. VII of the Presidency Small Cause Courts Act is not a suit within the meaning of S. 22 of the Act, and the High Court cannot award costs as between attorney and client for the plaintiff's failure to apply for ejectment in the Presidency Small Cause Court.

Krishnasami Chetti v. *The Natal Emigration Board* 70

Trust *Compromise—Usage—Its binding character.*

When the predecessors of the parties had on two previous occasions in 1845 and 1874 entered into a compromise as to certain disputes between them with regard to the trusteeship of a temple, and that compromise was acted upon for a series of years, their Lordships *held* that the compromise was binding upon the parties and their successors and could not now be questioned upon any theory of the extent of the right of either party in the abstract. The usage which had existed so long was the best exponent of their rights which was twice acquiesced in by the plaintiff's ancestors in legal proceedings in which opportunity was afforded of a definite decision as to the rights of the respective families.

Nilakandhen Namboodripad v. *P. R. Varma Valia Nambudri* 233

Trusteeship, *alienation of—Invalid—Sale of property valid though coupled with sale of trusteeship—Agreement to divide—Suit for specific performance—Joinder of defendants—S.* 28 *C. P. C.*

Where the grantor and his descendants had been successively managing a charity and there was no deed of endowment or other evidence, showing the course of devolution of the right of management, *held* that all the sons of the previous rightful manager were entitled to be trustees and an alienation of their rights by some in favor of one of them which amounts to complete divesting of their rights and not a mere delegation of powers liable to resumption is invalid.

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Where 6 divided branches of a Malabar Tarward and a seventh divided branch sued for their shares of the property which had belonged to an eighth branch which became extinct, *held*, that the suit was one for a distributive share of the property of an intestate and that Art 123 and not Art. 127, of sch II of the Limitation Act applied to the suit. The Karnavan of the defendants, branch came into possession of the properties of the extinct branch and was apparently managing the same till his death on behalf of all the branches entitled to them : *held*, that the defendants as his heirs were not liable to account for such properties to the plaintiffs, branches, unless they came into possession of his assets or he spent any of the properties for their benefit: *held also* that the 6 branches of the plaintiffs were entitled to institute a single suit for their six—seventh share of the properties and the suit was not bad for misjoinder of causes of action.

Ammu vs. *Kunhunni Menon* 34

Wrong— Extraodinary casualty—uppor riparian proprietor—lower riparian proprietor—See. *Torts*.

Zemindar -*Impartible, See* LIMITATION ACT (1). .. ... .